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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ERIN ANDREW CONN, *Petitioner,*

v.

JENNIFER ANN CONN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTION PRESENTED

Do *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court, under any and all circumstances, from taking into account, on a case by case basis, the interests of a father in his unborn child when his wife wants an abortion?

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PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT[1]

Petitioner Erin Andrew Conn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Supreme Court, entered in the above-entitled proceeding on July 15, 1988.

OPINIONS BELOW

The Order of the Indiana Supreme Court (not reported) affirming the Indiana Court of Appeals and adopting its opinion is reprinted in the appendix hereto, p. 1a, *infra*.

The Dissenting Opinion of Pivarnik, J., to the Order of the

[1] Pursuant to Rules of the Supreme Court of the United States, Rule 28.4(c), Petitioner hereby states that 28 U.S.C. 2403(b) may be applicable, due to the fact that constitutional and statutory provisions of the State of Indiana have been drawn into question regarding their Federal Constitutionality as applied. No court has yet certified to the Attorney General of Indiana that such provisions have been drawn into question.

Indiana Supreme Court (not reported) is reprinted in the appendix hereto, p. 2a, *infra*.

The opinion of the Indiana Court of Appeals (not yet reported) is reprinted in the appendix hereto, p. 13a, *infra*.

The Findings of Fact, Conclusions of Law, and Order of the Shelby [Indiana] Circuit Court is reprinted in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Indiana Supreme Court is invoked under 28 U.S.C. § 1257 (3) based on (1) the fact that the validity of state statutes, as applied, have been called into question under the Constitution of the United States and on (2) the assertion of the Respondent (the Wife herein) of rights under the Fourteenth Amendment of the Constitution, and (3) the assertion by the Petitioner (the Father herein) of rights under the Fourteenth and Ninth Amendments of the Constitution.

The Father brought this action in Shelby Circuit Court, invoking the equitable injunctive powers of the court, granted to it under Indiana constitutional and statutory authority, to weigh his interests in his unborn child against those of his wife in aborting their unborn child. The Wife asserted that her liberty to choose abortion under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), was absolute and prohibited such assertion of paternal rights and interests. The Shelby Circuit Court concluded that these cases did not prohibit a case by case judicial inquiry into the relative weight of the interests of the Father and Wife herein, and, on the facts of this case, issued a preliminary injunction enjoining the Wife from obtaining an abortion. See p. 27a, *infra*.

On the Wife's appeal, the Indiana Court of Appeals, on July 12, 1988, held that *Roe* and *Danforth* precluded consideration of the Father's rights and interests under any and all set of facts

and ordered the trial court to dissolve the preliminary injunction and dismiss all proceedings relating to the abortion.

The Indiana Supreme Court transferred the case to itself and likewise held that *Roe* and *Danforth* precluded the application of the court's injunctive power and that a woman's constitutional right to abortion was absolute as against the father of the unborn child. Thus, the Indiana statutes granting injunctive power to the trial court were effectively held unconstitutional as applied. Further, the Court refused to recognize the asserted rights of the Father to a judicial consideration of his interests under the Equal Protection and Due Process clauses of the Fourteenth Amendment and the Ninth Amendment. The Indiana Supreme Court issued its judgment and opinion on July 15, 1988. See p. 1a, *infra*. A Petition for Rehearing was denied on July 18, 1988. See p. 31a, *infra*.

The Shelby Circuit Court, pursuant to the Order of the Indiana Supreme Court, dissolved the preliminary injunction and dismissed all proceedings related to the abortion issue by docket entry of July 22, 1988, effective at 4:30 P.M. See p. 30a, *infra*.

Thus, there is a final decision in this cause from the highest court of the state of Indiana in a case raising issues under the Constitution as required by § 1257(3).

STATUTES INVOLVED

A number of Indiana constitutional and statutory provisions provide the trial court with equitable authority to adjudicate rights and interests and issue injunctions. These were effectively held unconstitutional as applied. They are set forth in the appendix. See p. 40a, *infra*.

STATEMENT OF THE CASE

In June of 1988, Erin Andrew Conn (the Father herein) learned that his wife, Jennifer Ann Conn (the Wife herein), was planning to abort the unborn child which they had conceived

within their marital relationship. The Wife had filed for dissolution, and advised the Father that she would abort the child if there was any chance of his gaining custody of her.[1] She did agree to carry the child to term if the Father would submit to putting the child up for adoption by a third party, foreign to the marriage.

The Father, distraught by this news, immediately sought legal advice. Based primarily on the precedent of a trial court in Vigo County, Indiana,[2] (in which a court had issued a permanent injunction barring a woman from aborting a child based on a consideration of the rights and interests of the father along with her own) and on a careful reading of what *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, actually held, the Shelby Circuit Court issued a temporary restraining order forbidding the Wife from aborting the unborn child until a hearing could be held. Upon the evidence at the hearing, the court preliminarily enjoined the Wife from aborting their unborn child until a hearing on a permanent injunction could be held.

The Father is twenty-three years old. He is seven courses short of receiving a bachelors degree in mathematics. He is assistant manager at a toy store and a second lieutenant in the United States Army Reserves. He has a history of stable employment, as does his family.

The Wife is nineteen. She is not in school, nor has she indicated any plans to pursue further education. She is unemployed.

The Conns have been married for fourteen months and have a five month old daughter, Crystal Rose Conn. They had

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[1] As the sex of the unborn child is unknown, he or she will be referred to herein as a female to avoid the awkward use of pronouns of alternative gender throughout this document.

[2] *Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App., filed April 12, 1988).

planned to attempt another conception in August, 1988. The Wife was approximately six weeks pregnant on June 27, when the Indiana Court of Appeals issued its opinion and judgment.

The testimony regarding the Wife's reasons for desiring an abortion mentioned only two reasons: that she did not want the Father to get custody of the child and her feeling that they could not financially afford another child. However, the Father currently makes $318 per week, plus a bonus based on profits to the retail chain store where he works, and $200 per month as an officer in the Army Reserves. Within the near future he anticipates receiving management training, by his employer, which will increase his income to between $350 and $450 per week (in addition to his military pay). The Father feels he is able to provide for the financial needs of the child and his family. Further, he has insurance to cover the expenses of prenatal care and the medical and hospital expenses of childbirth.

The record clearly indicates that the Father would suffer severe and irreparable harm, including the permanent loss of his right to care, custody, control and companionship of this child. The Father testified that losing his child would be like losing a part of himself. He desires that she be born "so that he can raise, nurture the child, and give the child everything he has." See p. 24a, *infra*.

The constitutional claims giving this Court jurisdiction under § 1257(3) were raised from the very beginning. The temporary restraining order was issued on June 17, 1988, by the Shelby County (Indiana) Circuit Court. In his Brief in Support of Motion for Preliminary Injunction, the Father argued that the Shelby Circuit Court had jurisdiction and power to issue a preliminary injunction, barring his Wife from obtaining an abortion, pursuant to the statutes governing dissolutions and to those giving the Shelby Circuit Court general powers and jurisdiction. Brief in Support of Motion for Preliminary Injunction at 2. He further argued that neither *Roe v. Wade*, 410 U.S. 113, nor *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, precluded the Shelby Circuit Court from issuing a preliminary injunction. Brief in Support of Motion for Preliminary Injunction at 4-7, 12-16.

The Father also asserted positive rights and interests in his unborn child of a federal constitutional dimension which should properly be weighed with the rights and interests of his wife to choose an abortion. *Id.* at 16-22.

On June 23, 1988, the Wife filed with the trial court a Motion to Dissolve Temporary Restraining Order and Motion for Immediate Ruling or, alternatively, for Immediate Hearing, citing *Roe* and *Danforth* for the proposition that she had an absolute right to obtain an abortion, unreviewable under any circumstances. On June 24, 1988, the Wife filed a Motion to Vacate Order to Show Cause and appeared at the hearing set by the circuit court.

At the hearing, the motion to dissolve the temporary restraining order was denied and the circuit court granted the Wife's motion to dissolve the order to show cause. An evidentiary hearing was then conducted on whether a preliminary injunction should be granted.

Based on the evidence, the circuit court issued a preliminary injunction, ruling that in a balancing of the Father's rights and interests in his unborn child with those of the Wife in aborting the child, on the facts of this particular case, the balance weighed in favor of the Father and he had, therefore, demonstrated a likelihood of success on the merits. Therefore, on June 27, 1988, the Shelby Circuit Court ordered the Wife not to abort her unborn child. See p. 27a, *infra*.

In his Brief before the Court of Appeals, the Father renewed his claim that, under I.C. § 33-4-6-2 (the general jurisdictional power grant of authority) and I.C. § 31-1-11.5-1(a)(2) (the dissolution statute authorizing the provision of "appropriate procedures for the dissolution of marriage"), the Shelby Circuit Court had power to preliminarily enjoin the Wife from obtaining an abortion, based on a balancing of their interests and that *Danforth* did not prohibit such judicial action. Brief of Appellee at 43, 5. He also asserted a constitutional right to consideration of his rights and interests in his child. *Id.* at 30.

On July 12, 1988, the Indiana Court of Appeals reversed the circuit court, holding that *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, was dispositive and precluded Indiana courts from exercising their state statutory and constitutional powers to consider the competing rights and interests of a mother and father in their unborn child and to issue injunctions in the abortion context. See p. 13a, *infra*. The Court of Appeals noted the Father's claim that "*Danforth* d[id] not preclude this court from resorting to a balancing test of the competing rights of the husband and wife." See p. 18a, *infra*.

In his Petition for Transfer and Expedited Appeal to the Indiana Supreme Court, the Father again asserted his statutory rights to an equitable balancing and injunction and again asserted that *Danforth* did not preclude such judicial action. See p.35a, *infra*. He also asserted his Equal Protection and Due Process rights to a judicial balancing of his rights and interests with those of his Wife to determine whether or not she should be able to obtain an abortion. *Id.*

The Indiana Supreme Court, in a series of orders filed July 15, 1988, transferred the case to itself, adopted the opinion of the Indiana Court of Appeals as its own, and ordered the Shelby Circuit Court to vacate the preliminary injunction and dismiss all proceedings relating to the abortion on Friday, July 22, 1988, at 4:30 p.m. See pp. 1a, 11a, 12a, *infra*.

The Father appealed to Justice Stevens and the Chief Justice for a stay pending expedited consideration of the case. These applications were denied on July 20 and 21, 1988, respectively. The Father has received no official notice that any abortion of his unborn child has yet taken place, but, if it has, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases.[3]

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[3] *Roe v. Wade*, 410 U.S. at 125. In both *Roe* and *Doe v. Bolton*, 410 U.S. 179, 187 (1973), this Court granted review of cases to women who had already completed their pregnancies. As explained by Justices Scalia and O'Connor,

(Footnote continued)

REASONS FOR GRANTING THE WRIT

I. The Indiana Supreme Court erred in holding that *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court from considering the rights and interests of a father, under any set of facts, when his wife wishes to abort their unborn child.

This Court will consider granting a Writ of Certiorari when "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applica-

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Footnote 3 continued

concurring in the recent case of *Honig v. Doe*, 108 S.Ct. 592 (1988), abortion jurisprudence "differ[s] from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without ever reaching us." *Id.* at 609 (emphasis in original). In the instant case, the same principle is applicable. Although the Father and the Wife may never again have occasion to litigate between them her right to an abortion, there is at least as great a possibility that she will again be subject to such an action or that he will again seek to initiate such an action in relation to another partner as there was that Jane Roe would again be subject to the strictures of Texas abortion laws in *Roe*. In the public at large the number of such cases is on the rise. Counsel for Father have been involved in three such actions in Indiana alone. This is a matter of great public importance concerning an unsettled area of the law which requires resolution by this Court. If it is not so resolved, such cases will continue occurring and evading review until such a time as the Court agrees to either accept one on expedited appeal or to find a case, such as this one, within the exception to the mootness doctrine. In the present case, Father timely presented an application and a reapplication for a stay pending expedited consideration of this cause before this Court. But for the denial of the stay applications by this court, there would not have been a possibility of mootness, as the Mother would have been subject to contempt penalties had she defied the injunction sustained by the stay, which contempt potential would have prevented the case from becoming moot. Although counsel for the Father have received no official notice that the Wife has obtained an abortion, a newspaper article indicates that an abortion has apparently been performed. *Abortion Cleared by Courts Is Done*, Indianapolis News, Aug. 12, 1988, at B-6, col. 1.

ble decisions of this Court." Supreme Court Rule 17.1(c). The Indiana Supreme Court, in the decision below, interpreted this Court's decision in *Roe v. Wade*, 410 U.S. 113, to create an absolute right in a wife to abort the child of her marital union and interpreted this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, as precluding a court, under any and all circumstances, from taking into account, on a case by case basis, a father's fundamental rights and interests in his child when his wife wants an abortion. These interpretations of *Roe* and *Danforth* are erroneous. In addition, while *Danforth* has precluded an absolute spousal veto, this Court has not settled the extent to which father's rights and interests may be weighed by a court with the right of the wife to have an abortion.

This case presents a matter of great public importance. In every case where a woman seeks an abortion, there is either a father or a husband who is the father of the child. Over one and a half million abortions are performed yearly. In each of these cases, the rights and interests of fathers and husbands in their children are potentially at stake. Of course, actions such as the present one would only be undertaken by a father with notice of the intent of the mother to obtain an abortion and who has concern over the abortion of his unborn child. The Indiana Supreme Court, however, closed the door on the consideration of such rights and interests by barring their judicial consideration under any facts. The Indiana Supreme Court thus gave a wife an absolute veto power over any interest of her husband regarding the child they conceived within their marital union. The abortion right was made absolute and the rights and interests of husbands were forever held for naught.

In the instant case, the Father sought to enjoin the abortion because of the grave loss he would suffer if the abortion occurred — the loss of a potential opportunity to raise, nurture and enjoy the companionship of the child — comparable to the cutting off of his own arms and legs, he said. The Wife, however, wants an abortion, in part, to prevent her husband from having custody of the child at birth. She said that she would abort

unless the Father agrees to an adoption of their child by a third party. She said that she would abort if there is any chance of the Father getting custody of the child. Upon these facts, the trial court issued a preliminary injunction, to preserve the status quo, in order to consider the rights and interests of both the Father and the Wife. This the Indiana Supreme Court has forbidden, based upon an erroneous interpretation of *Roe* and *Danforth*.

This case, therefore, presents only the issue of whether fathers have sufficient rights and interests which, on the facts of an individual case,[4] a trial court may take into account, in determining whether a wife may abort their child. This case, therefore, presents an urgent question of federal law, which should be settled by this Court, and which the Indiana Supreme Court decided contrary to the applicable decisions of this Court.

A. *Roe* specifically and expressly did not consider a father's rights and explicitly declared that the right to an abortion is not absolute.

In *Roe v. Wade*, 410 U.S. 113, this Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *id.* at 153, and thereby struck down a Texas criminal statute which only allowed life saving abortions. The Court viewed the abortion decision "in all its respects" as "inherently, and primarily, a medical decision," except where "important state interests provide compelling justification for [state] intervention." *Id.* at 165-66.

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[4] In a similar case, for instance, a trial court enjoined an abortion, upon the request of an unwed father, after finding that the mother wanted the abortion in order "to avoid childbirth, . . . to look nice in a bathing suit this summer, . . . not to be pregnant in the *summertime*, . . . and not to share [the father] with the baby." *In the Matter of Unborn Child H.*, No. 84C01-8804-JP-185, slip op. at 2 (Vigo (Ind.) Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. 1988).

The Indiana Supreme Court erroneously viewed *Roe* to have conferred on a woman "an unconditioned right to have an abortion in the first trimester." *See* p. 19a, *infra*. In fact, the Court in *Roe* considered and rejected such a claim:

> [S]ome . . . argue that the womans right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . . In fact, it is not clear to us that the claim asserted by some . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests . . . .

410 U.S. at 153-54.

In addition, the *Roe* Court explicitly declared that it was not considering the question of paternal rights asserted against the woman's right to choose abortion. *Id.* at 165 n.67 ("Neither in this opinion nor in *Doe v. Bolton* . . . do we discuss the father's rights . . . .").

The abortion right in *Roe*, therefore, is not absolute and is subject to important state interests in regulation and to being weighed against competing fundamental rights and interests.

B. *Danforth* considered only a state statutory requirement of spousal consent to every abortion, which "determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part."[5]

The Indiana Supreme Court claims that, because the abortion decision "concerns only her," see p. 20a, *infra*, therefore *Danforth*, 428 U.S. 52, is dispositive of this case, and bars a

[5] 428 U.S. at 70 n. 11.

court from even considering a father's rights and interests in his child when his wife wants an abortion. The Indiana Supreme Court viewed the trial courts issuance of a preliminary injunction, in order to preserve the status quo, as "granting the husband the right [to veto his wife's abortion]." See p. 20a, *infra*. Because the Father "has no right *under any facts of this case* to *veto* [his wife's] decision to obtain an abortion," the Indiana Supreme Court dismissed all proceedings related to the abortion issue. *Id.* (emphasis added).

The Indiana Supreme Court misunderstood the relief sought by the Father and the trial court's decision. The Father did not seek, nor was he granted by the trial court, a right to "veto" his wife's abortion decision. The trial court restrained the abortion to preserve the status quo so that the trial court could balance the Father's "rights in the fetus grounded . . . in the Fourteenth and Ninth Amendments to the United States Constitution . . . against the Wife's constitutional right to an abortion," which the trial court viewed as "an entirely appropriate judicial function where such [competing] rights are asserted." *Id.* at 26a. Thus, the Father was seeking judicial consideration of his constitutional rights and interests, which the trial court below would consider at a final hearing, on the facts of this case, with the constitutional right of the Wife to obtain an abortion.

Danforth, 428 U.S. 52, did not involve judicial consideration of competing constitutional rights and interests on a case by case basis. Rather, *Danforth* dealt with a state statute that gave all husband's an absolute veto, for any or no reason, to the blanket exclusion of all wives. The husband (who might not even be the father, *id.* at 69) had a unilateral power to forbid an abortion by his wife, for any reason or no reason, which could not be controverted or reviewed by any higher authority. *Id.* at 71. Because the statute required the husband's consent in all cases, the wife could not get an abortion even if her husband could not be located. *Id.* at 69. The state assumed lack of consent by all husbands unless they stated otherwise. *Cf. Martin v. Struthers*, 319 U.S. 141, 144 (1943) (A statute barring religious solicitors from calling residents to their doors was

unconstitutional because *inter alia* "it substitute[d] the judgment of the community for the judgment of the individual householder.").

Faced with a statute which permanently and absolutely struck the balance of rights of parents in favor of the husband in every case, this Court held that a "State may not constitutionally require the consent of the spouse, as is specified under [the Missouri statute therein], as a condition for abortion during the first 12 weeks of pregnancy." *Danforth*, 428 U.S. at 69. Thus, this Court struck down a *per se* rule, not case by case judicial consideration of rights and interests.[6]

The majority opinion in *Danforth* was careful to clarify, in responding to the dissent by Justice White, that it was not considering the constitutionality of a more nuanced approach allowing for case by case consideration of a father's rights and interests in his child. Justice White criticized the Court's decision, claiming that:

> "the majority finds in the United States Constitution" a rule that the State *must* assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child."

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis added).

The Court responded:

> This section does much more than insure that the husband participate in the decision whether his wife should have an

[6] At one point, this Court could be misinterpreted to have engaged in balancing. In considering the Missouri spousal consent statute, this Court said: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Danforth*, 428 U.S. at 71. This Court, however, was comparing the effect of leaving the statutory *per se* absolute veto intact in every case with the effect of striking it and leaving the woman free to "act unilaterally." Given the choice between these absolutes, the Court held the rights of the wife must prevail.

> abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife *always outweighs* any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to *prevent unilaterally, and for whatever reason*, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

Id. at 70-71 n.11 (emphasis added).

A comparison of the absolute spousal veto right rejected in *Danforth* and the judicial inquiry contemplated by the trial court below clearly demonstrates that *Danforth* does not apply to this case. *Danforth* described the Missouri statute as having "delegate[d] to a spouse a veto power," which was "delegated authority to a particular person . . . to prevent [an] abortion." *Id.* at 69. In the instant case, the trial court did not propose to delegate to anyone a "veto power" or to "delegate authority" to the spouse to prevent the abortion. On the contrary, it was the trial court itself which was to weigh the interests of both parties to determine whether or not an abortion should occur.[7] In addition, it cannot be said that a judicial inquiry is "unilateral," as the *Danforth* Court described the Missouri spousal veto. *Id.* at 70. The judicial inquiry herein is conducted as an adversary proceeding in which both the rights and interests of the Wife *and* the rights and interests of the Father would be considered.

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[7] That this Court does not consider a judicial rejection of an abortion decision, under proper circumstances, to be an unconstitutional "veto" is made clear by its opinions relating to parental rights when a minor is seeking an abortion. In *Danforth*, this Court also struck down an "absolute veto" right in parents. *Id.* at 72-79. If this also rejected judicial involvement as well, the question of parental involvement would have been settled in *Danforth*. This, however, is not the case. In subsequent cases, this Court has upheld, both in principle and in fact, state statutes which require a minor to seek parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 409-93 (1983). In doing so this Court rejected the view of the

(Footnote continued)

Nor does the trial court below suggest that "the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it," as the Missouri spousal veto statute would have done. *Id.* at 70 n.11. On the contrary, the trial court proposed to weigh the interests of both parties, against "a presumption that the [Wife] is entitled to an abortion," which the Father could overcome only by "clear and convincing evidence." See p. 27a, *infra*.

Finally, the trial court did not propose to enjoin the abortion "for whatever reason." *Danforth*, 428 U.S. at 70 n.11. Indeed, the trial court was careful to detail the factors which would be relevant to its decision. See pp. 26a-27a, *infra*. Thus, a judicial inquiry, weighing the interests of both parties, is fundamentally different from a Missouri spousal veto rejected in *Danforth*.

In sum, *Danforth* does not control the present case, as it did not consider whether, on a case by case basis, the constitutional rights and interests of a father could be considered along with the rights and interests of his wife, as sought in the case at bar.

II. The Father has fundamental rights and interests in his unborn child which should be judicially considered, on the facts of this case, along with the right and interests of his Wife in aborting their child.

Footnote 7 continued

dissenters that "a parental or *judicial veto* of a minor's decision to obtain an abortion . . . [is] unconstitutional." *Id.* at 504 (Blackmun, J., dissenting) (emphasis added). The requirement of parental or judicial consent was supported, in part, by the right of parents to "the custody, care and nurture" of their children. *Bellotti v. Baird (II)*, 443 U.S. 662, 638 (1979). By providing a judicial forum for the minor to seek authorization for abortion without parental consent, the statute did not "give a third party an absolute, and possibly arbitrary, veto . . . regardless of the reason for withholding the consent." *Id.* at 643. This is so even though the court could refuse consent to the abortion for the minor, if the court found that the desired abortion was not "in her best interests." *Id.* at 644.

The trial court below held that the Father had "rights in the fetus grounded . . . in the 14th and 9th Amendments to the United States Constitution." See p. 25a, *infra*. In ordering the trial court to "dismiss all proceedings relating to the abortion issue," the Indiana Supreme Court dismissed the Father's rights as "some nebulous common law concept." *Id.* at 19a. In doing so, the Indiana Supreme Court ignored well established constitutionally protected rights and interests of husbands and fathers. The Indiana Supreme Court failed to give substantial weight to these rights and interests, on the erroneous assumption that consideration of them was barred by *Danforth*.

Three principal lines of cases have discussed the importance of the Father's rights and interests: (1) those relating to procreation, (2) those relating to termination of parental rights and (3) those relating to family relations. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This Court has long emphasized that "without doubt [the liberty guaranteed under the Fourteenth Amendment] denotes the right of the individual to . . . establish a home and bring up children . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

A. The Father has a right and interest in procreation, which is especially significant where it has become particularized in this specific, unborn child.

The term "procreation" is defined as "the entire process of bringing a new individual into the world." *Dorlands Illustrated Medical Dictionary* (24th ed. 1965). Similarly, in the recent case of *In re Baby M*, 537 A.2d 1227 (N.J. 1988), the right to procreate was defined by the New Jersey Supreme Court: "The right to procreate very simply is the right to have natural children . . . ." *Id.* at 1253. The New Jersey Supreme Court observed that Mr. Stern, the natural father, had not been deprived of that right, as Baby M was his child. *Id.* The court indicated, however, that the right of procreation did not, in and of itself, give Stern the right to the custody of the child at birth.

Id. The right to the "custody, care, companionship, and nurturing" of a child was not a part of the right to procreation, but was a separate right. *Id.*

Employing this analysis, it becomes clear that the Father's fundamental right to procreate is a right to have a natural child. Likewise, the Wife has a right to procreate. It is logically distinguishable from the right to destroy that which has been procreated — the right to abortion — which was granted to women in *Roe*.

In this case, Father and Wife have conceived, by consensual sexual intercourse, a child within their marital relationship. As a result, the Father's general procreational right has become particularized in that unborn child. He has, therefore, a distinct constitutional interest, in continuing the procreation, already begun, to birth, which the trial court sought to consider along with her right, as declared in *Roe*, to destroy the unborn child.

B. The Father has a right and interest in his unborn child, which is a natural right inherent in his biological relationship to the child.

Natural parents also have constitutional rights in the care, custody, companionship, and control of their children that a state cannot sever absent clear and convincing evidence of parental unfitness. *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, this Court held that a "preponderance of the evidence" standard of proof for termination of parental rights did not sufficiently recognize "the fundamental liberty interest of natural parents in the care, custody, and management of their child." 455 U.S. at 753. This Court observed that: "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." 455 U.S. at 753. Similarly, a state cannot discriminate on the basis of sex by making it easier to sever a father's rights in his children than it is to sever the mother's rights. *See Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

This Court, in *Stanley*, summed up the rights of fathers as follows:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious . . . than property rights[.]" "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment.

405 U.S. at 651 (citations omitted).

Thus, the right of a father to the care, custody, and management of his child is a fundamental right. In *Santosky*, this Court indicated that the father's rights in his child originate in the liberty clause of the Fourteenth Amendment which gives families freedom of personal choice in matters of family life. 455 U.S. at 745. The father's right in his child has been declared "cognizable and substantial" under the United States Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978).

It is perhaps too obvious to require statement that a father cannot have companionship with, provide care for, or exercise management and control over a dead, aborted child. For him to exercise his fundamental rights, the unborn child must be protected until birth. Indeed, one of the interests at the heart of the constitutionally protected parent-child relationship is that of providing "loving protection" for the child. *Rivera v.*

Minnich, 107 S.Ct. 3001, 3004 (1987). Hence, the Father herein has sought consideration of his fundamental rights and interests along with those of the Wife to determine, given the existence of competing fundamental rights, whose interests, on the facts of this case, are the weightier.

On the other hand, biology alone does not create constitutional rights in one's children. As this Court has stressed in all of its recent cases dealing with unwed father's rights, biology creates only an opportunity that the father must exercise by assuming genuine responsibility for his children. Then, their relationship is protected. Thus, the rights of even an unwed father who has had custody of his children are protected, *see Caban v. Mohammed*, *supra*, and *Stanley v. Illinois*, *supra*, but absentee fathers have no such strong rights. *Cf. Lehr v. Robertson*, 463 U.S. 248 (1983) and *Quilloin v. Walcott*, 434 U.S. 246. This Court summarized its holdings in its most recent case on the issue, *Lehr v. Robertson*, 463 U.S. 248, in which it held that a father, who had no custodial, personal, or financial relationship with his daughter in the two years since her birth, had no absolute due process right to be heard in her adoption proceedings. The Court said:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262. In this case, by contrast, the Father has "grasp[ed] that opportunity and accept[ed] some measure of responsibility for the child's future," and thus his interest is constitutionally protected. He has accepted this responsibility especially by entering into the sacred relationship, regulated by society largely for the protection of children, known as marriage.

C. The Father also has a fundamental right and interest inherent in his status as a husband in the family unit.

By the fact of his marriage to the Wife herein, the Father has acquired additional constitutional protection. Even before privacy rights (on which the Father's rights in his unborn child are founded) were recognized as attaching to individuals, they were found to be inherent in family relationships and in the marital relationship. Thus, in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943), this Court recognized as constitutionally protected "the private realm of family life." In addition, in *Griswold v. Connecticut*, 381 U.S. 479 (1964), this Court observed:

> We deal with a right of privacy older than the Bill of Rights — older than our policital parties, older than our school systems. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Id. at 486. The concurrence in *Griswold* also explained the roots of the marital privacy right in the Ninth Amendment, finding it "fundamental" because it was rooted in the "traditions and [collective] conscious of our people." *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

It is clear that the right of a husband to the care, custody, companionship, and management of his children, born or unborn, is a fundamental right rooted historically in the traditions of our nation and western civilization. It is a fundamental right independent of any state delegation of power and entitled to great respect and protection.[8]

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[8] John Noonan, now Judge of the Ninth Circuit, has argued that fathers and husbands have rights in their unborn children based on: (1) the right to procreate in *Skinner*, 316 U.S. 535 ("If it did not include [the protection of the child procreated throughout pregnancy], all that a man had was a liberty to fertilize an ovum — a liberty that, if not actually meaningless, was a good deal

(Footnote continued)

Thus, husbands have three rights of constitutional dimension in their unborn children. First, they have a right to procreate, which begins with the development and preservation of the ability to procreate and extends to the birth of the child. This general right becomes particularized with the conception of an unborn child resulting from an act of consensual intercourse. This particularized right to procreate continues to the birth of that particular child. Second, husbands have rights to the care, custody, control, and companionship of their children. This right includes the "loving protection" of a child, begins at conception, and continues until the child reaches the age of majority. Finally, a husband has a constitutional right in his family relations, which include the unborn child herein.

Therefore, at the time when the child is in utero, the Father in the case at bar has three distinct constitutional rights in his unborn child. These fundamental rights and interests the trial court sought to consider with the rights of the Wife, on the facts of this case. This judicial consideration of the Father's rights and interests was prohibited by the Indiana Supreme Court upon a misreading of *Danforth*.[9]

Footnote 8 continued

less than full freedom to procreate."); (2) the right to marry in *Loving v. Virginia*, 388 U.S. 1 (1967) ("If liberty to marry did not include liberty to have children, freedom to marry meant a great deal less than full freedom to marry."); (3) the right to consent to adoption in *Armstrong v. Manzo*, 380 U.S. 545 (1965) ("[I]f a father could not lose his rights to one of his children without a hearing, even if the child was in the mother's control, he could not lose his child within the mother's womb without at least an opportunity to object."); and (4) the rights of a father set forth in *Stanley*, 405 U.S. 645 ("It could reasonably be argued that, if biology conferred rights, a father had as much interest in an unborn child of eight weeks as in an infant of eight months.") *J. Noonan, A Private Choice* 90-91 (1979).

[9] It is inconceivable that this Court, having built *Roe* on a foundation of privacy cases which protect the Father herein, *Roe*, 410 U.S. at 152-53 (citing *Griswold v. Connecticut; Meyer v. Nebraska; Loving v. Virginia; Skinner v. Oklahoma; Prince v. Massachusetts; Pierce v. Society of Sisters)*, would turn *Roe* against these privacy rights and destroy its own foundation.

III. The trial court, as a neutral arbiter of competing rights and interests, properly issued a preliminary injunction to prevent the Wife from having an abortion, pursuant to its consideration of the respective rights and interests on the facts of this case.

Unlike state action in enacting the statute at issue in *Danforth*, the action of the trial court in the instant case does not involve the state taking sides in the abortion decision. Rather, the court is acting as a neutral arbiter, evenhandedly considering competing rights and interests. The Indiana Supreme Court indicated no state law flaw in the jurisdiction of the trial court or in its issuance of a preliminary injunction. It held only that *Roe* and *Danforth* precluded judicial consideration of the Father's rights and interests.[10]

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[10] Indeed, the trial court was an appropriate forum for the resolution of such competing assertions of right. The Wife filed a dissolution action against the Father in which the Father sought the preliminary injunction herein to enjoin her from aborting their child. Under Indiana law, a trial judge in a dissolution action has full jurisdiction over all issues involved in the marriage relationship of the couple. The trial court is to hear all the facts and apply the law to make a division of the party's property and to provide for the care, custody and support of minor children. In doing so, the court may place custody of the children in either party I.C. § 31-1-11.5-21 and provide for support from and visitation with the other. I.C. § 31-1-11.5-12; I.C. § 31-1-11.5-24. The court's jurisdiction extends to unborn children of the marriage, *see L.F.R. v. R.A.R.*, 378 N.E.2d 855 (Ind. 1978), and the approved practice is to refrain from granting a dissolution while the wife is pregnant. *Id.* Indeed, the Indiana legislature manifestly wanted the divorce court to consider unborn children, since it went so far as to require verified confirmation or negation of their existance in every divorce petition. I.C. § 31-1-11.5-4(a)(4). For all children conceived by the marriage, Indiana law presumes the husband to be the father, a presumption that can only be overcome by irrefutable proof of the husband's impotence, of lack of access to the mother, of total absence or by clear and satisfactory proof of no sexual intercourse. *L.F.R.*, 378 N.E.2d at 856. Upon a finding that the wife has conceived, Indiana law "fixes a responsibility on the husband to care for that child in the same manner he cares for those already born and in existence at the time of the dissolution of the marriage." See p. 9a, *infra* (Pivarnik, J., dissenting).

(Footnote continued)

However, the preliminary injunction was proper under present interpretations of the United States Constitution. Either of two analyses provides adequate justification for the trial court's actions.

A. Under Substantive Due Process analysis, as employed in *Roe*, the Father had a compelling interest in his unborn child, on the facts which the state court found, sufficient to justify the court in limiting the Wife's liberty to have an abortion.

In *Roe*, this Court built the abortion privacy right on a Substantive Due Process analysis of the Fourteenth Amendment. Having declared that the right to abortion was fundamental, the Court proceeded to find two compelling state interests, in maternal health and in protection of "potential" human life, which were held to vary in significance with the stage in the pregnancy. For the state court to burden the Wife's liberty to choose abortion free from state interference it must have a compelling interest in doing so and the action must be "narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155.

Clearly, the state has a legitimate interest in protecting the rights of fathers in their children. Given the fact that these rights are themselves fundamental rights as against the state, there can be little doubt that the state's interest in protecting these rights constitutes a significant state interest. And where, as in this case, the interests of the Father in his child outweigh the interest of the Wife in aborting the child (as the trial court found, even using a presumption in favor of the Wife

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Footnote 10 continued

Thus, with all of the rights and responsibilities of the Father and Wife, with respect to their child, subject to determination by the trial court in the dissolution proceeding, "[i]t is incomprehensible . . . [that] this same trial court is foreclosed [by *Danforth*] from even considering the question of whether the wife should be permitted to destroy this creation of both parties in the marital relationship merely because she wants to." *Id.*

and imposing on the Father a clear and convincing evidence burden of proof) the interest of the state in protecting paternal rights and interests becomes compelling.

Moreover, such judicial consideration of the rights and interests of both parties is "narrowly tailored" to meet the task of protecting compelling interests and eliminating those that do not reach the level of being compelling. Trial courts are skilled at resolving the common assertions of competing rights as occurs commonly in dissolution and custody actions. Furthermore, only a Father who receives notice and is sufficiently concerned about his unborn child will engage in such actions. Unlike the statute in *Danforth*, there is no blanket presumption that all husbands will deny consent.

In addition, in the abortion context, this Court has demonstrated that a compelling interest is not always necessary when rights and interests of other parties are at stake. Parental rights in the abortion context have been determined to be "significant" but not "compelling." *Danforth*, 428 U.S. at 75. Even so, the parents rights and interests were considered great enough to uphold the requirement that minors get parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

From its inception, the abortion right has been regarded, not as absolute, but as a right to be weighed and balanced against other important interests. In *Roe v. Wade*, 410 U.S. 113, after describing the factors on which it based its conclusion that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to teminate her pregnancy," *id.* at 153, this Court noted that this right "must be considered against competing state interests." *Id.* at 154.

The parents' "significant" interest in their children has been found by this Court to be sufficient to support an individual case by case judicial consideration of a minor's abortion decision. On the same date that this Court issued its opinion in *Danforth*, it also decided a companion case, *Bellotti v. Baird (I)*, 428 U.S. 132 (1976). In *Danforth* this Court struck down a

statute granting a minor's parent an absolute right to veto the minor's abortion, just as it struck down an absolute spousal veto statute. In *Bellotti (I)*, however, the Court refused to strike down on its face a statute that provided for a judicial inquiry into the facts and circumstances in which a minor desires to obtain an abortion without her parents' consent. Rather, it directed the lower federal court to obtain sufficient information about the procedures involved to be able to determine whether they adequately protected the minor's rights.

> [A] . . . statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interest. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."

428 U.S. at 145.

In *Bellotti v. Baird (II)*, 443 U.S. 622 (1979), a plurality of this Court, noting that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors," *id.* at 637, set forth a scheme under which there might constitutionally be provisions "for parental notice and consent in a manner that does not unduly burden the right to seek an abortion," *id.* at 640, a scheme grounded in individual judicial determination on a case by case basis of whether a minors abortion should be authorized or precluded. In *Aschcroft*, 462 U.S. 476, a Missouri statute adopting such a scheme was approved.

As discussed above, the Father's fundamental rights and interests are at least as strong as parent's, if not stronger. When a minor seeks an abortion without parental consent, the parents right to the "management" of his child has been infringed. An abortion of the Father's child, however, is more like a parental termination proceeding which "seeks not merely

to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759. The Father, therefore, has a sufficient cognizable interest upon which to base a judicial inquiry into whether his wife will abort their child.

The fact that the trial court had an interest sufficient to burden the Wife's liberty to abort, whether characterized as "compelling" or "significant," is apparent from the facts of this case.[11] Obviously, if the preliminary injunction had not issued, the Wife would have aborted their child, permanently and irrevocably terminating his constitutional rights and interests vis-a-vis his child. Thus, the Father would have suffered a grave loss and irreparable harm. The unborn child herein could never be replaced. A life would be lost. There is no legal remedy which would replace that life. Moreover, her reasons for wanting an abortion were found by the trial court to be of less weight than his interests in the unborn child. Thus, the trial court was correct in concluding that the Father's legal remedies were inadequate and he would suffer irreparable harm if the preliminary injunction were not issued, see p. 26a, *infra*, and in issuing the preliminary injunction.

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[11] The trial court found that the Wife was approximately six weeks pregnant at the time of the hearing, see p. 23a, *infra*, and the Father is presumed to be the father of the child. *Id.* at 25a. The Wife said she wanted an abortion for three reasons: (1) she didn't think they could afford another child, (2) because the Father refused to agree to the adoption of the child once born, and (3) if there was any chance of the Father getting custody of the child, once born. *Id.* at 24a. There was no evidence that the Wife needed an abortion for medical, emotional, psychological or family reasons, or because of any unusual risks facing her if she carried the pregnancy to term. *Id.* In addition, the Wife was not in school and did not have any plans for further education. *Id.* at 22a.

Thus, on the side of the Wife, there was not evidence of any particular or unusual harm that would be occasioned by the Wife bringing the child to term. In addition, two of her reasons for abortion, that the Father refused to consent to adoption of their child and that the he might get custody of their child, were spiteful, manipulative, and retaliatory. In addition, these two reasons also indicate that the Wife does not actually object to carrying the child to term but really wants to deny to the Father the child. Finally, while this pregnancy was unplanned, the parties did plan to have a child in the near future. *Id.* at 23a.

(Footnote continued)

B. The trial court was also justified in limiting the Wife's right to have an abortion based on the traditional balancing approved by this Court where competing rights collide.

The weighing and balancing of constitutional rights and interests, on a case by case basis, is an everyday occurrence in courts throughout the nation. Parents have equal constitutional rights which are routinely weighed in making custody and visitation rights determinations in divorce and paternity actions. Similarly, criminal courts are not infrequently faced with the task of balancing the rights of a defendant to a fair trial — a right that can be undermined by pretrial publicity that taints a jury trial — against the freedom of the press. *See Nebraska v. Press Assn.* , 427 U. S. 539 (1976).

Footnote 11 continued

On behalf of the Father, the trial court found that he was a high school graduate, with college training, and a second lieutenant in the Army Reserves. *Id.* at 22a. He was in management training with his employer and, upon completion, would be eligible to be a store manager at a salary of $350 to $450 per week. *Id.* at 23a. The Father, therefore, felt financially secure and was capable of raising the child without financial support from the Wife for the child. *Id.* The Father wants the child to be born so he can raise and nurture her and give her everything he has. *Id.* If the Wife had an abortion, the Father would feel a great loss, comparable to the loss of cutting off his own arms and legs. *Id.*

Thus, on the side of the Father, there was evidence that he could financially raise the child, despite the fears of his wife. In addition, from the facts it appears that he is a responsible person with a bright future and with a sincere interest in and concern for his child. He would suffer grave emotional harm from the loss of his child. His interests outweighed hers and his threatened injury outweighed any threatened harm to the Wife. *Id.* This is particularly true in this case since there was no evidence that the Wife even consulted with a physician regarding the abortion, despite the fact that this Court has held the "the abortion decision necessarily involves a medical judgment. "*Carey v. Population Services International*, 431 U. S. 678, 699 n. 25 (1977) (citing *Roe*, 410 U. S. at 164). On these facts, therefore, the trial court had a compelling interest in the Father which it sought to protect by issuing the injunction.

These standard adjudications cannot be said to overburden either the courts or the litigants subjected to them.[12] They are a crucial part of the unique and essential role of the judiciary, which is precisely to serve as an arbiter applying neutral principles of law and considerations of equity to resolve disputes among those with competing claims of rights.

The Wife erroneously claimed below that the Father must show a compelling state interest in order for a court to balance his rights and interests against his wife's. Brief of Appellant (in the Indiana Court of Appeals) at 21-24. Although, as shown above, the state court does have a compelling interest, this argument is predicated on the claim that, in the Wife's view, the Father has no competing constitutional rights. *Id.* at 29 ("[T]he man has no enforceable rights in the fetus vis a vis the woman prior to birth."). In fact, as demonstrated above, the Father has equally fundamental constitutional rights here. The courts traditionally balance such rights, on a case by case basis, in order to determine which outweighs the other.

Thus, under the sort of analysis employed where competing rights of roughly equivalent significance collide, the court need only compare the relative weight of the competing interests to determine whose rights prevail. On the facts of this case, the Father's rights and interests prevail, as found by the trial court, and the trial court was justified in enforcing his rights in preference to those of the Wife.

IV. Denying the Father the opportunity for case by case judicial consideration of his profound rights and interests in his unborn child with those of his Wife would deprive him of his rights under the United States Constitution.

Along with his assertion that *Roe* and *Danforth* do not preclude judicial consideration of his rights and interests with

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[12] For cases rejecting "burden on the court" argument, when constitutional rights are asserted, *see Stanley*, 405 U.S. at 656 n. 8; *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

those of his wife in the context of an abortion decision, the Father also asserts positive constitutional rights to such consideration. He asserts these under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and under the reserved rights of the Ninth Amendment.

First, under Indiana's Dissolution of Marriage statute, the Wife is granted significant rights against the Father and the Father's responsibility toward any children of a marriage can be enforced. Thus, the Father may be forced by the state court, in an action initiated by the Wife, to provide the basic support needed for the survival of their child. On the other hand, if the Indiana Supreme Court's decision stands, the Father's interests in his child will be subject to absolute and irreversible termination at the unilateral and completely unreviewable discretion of the Wife. This denies the Father the Equal Protection of the law.

Second, By refusing to enforce the Father's rights and interests against the Wife, the state is depriving him of his Procedural Due Process rights as set forth above. See II(B), *supra*. At a minimum, where there are conflicting rights with regard to the child, the Father should be provided a hearing and an opportunity to have his rights and interests considered on a roughly equivalent basis with those of the Wife. Moreover, under Substantive Due Process analysis, as employed in *Roe*, where there is a fundamental right, the state must have a compelling interest in order to burden that right and the state action must be narrowly drawn to effectuate that interest. These conditions are not met in this case.

Finally, the Father asserts his rights in his unborn child and to a normal judicial forum for the assertion of his rights under the Ninth Amendment of the United States Constitution, because the rights of fathers to the care, custody, and companionship of their children are ones "retained by the people." Such rights may not be disparaged by other rights enumerated in the Constitution.

CONCLUSION

WHEREFORE, Petitioner, Erin Andrew Conn, respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Supreme Court.

Respectfully submitted,

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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ERIN ANDREW CONN, *Petitioner,*

v.

JENNIFER ANN CONN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

APPENDIX

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[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER AFFIRMING THE COURT OF APPEALS

THE COURT, having granted Appellee's "Petition for Transfer and Expedited Appeal," now adopts the opinion of Judge Neal written on behalf of the unanimous First District of the Court of Appeals and affirms its judgment. Appellate Rule 11(B)(3), Ind. Rules of Procedure.

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER O. DEBRULER
Acting Chief Justice

SHEPARD, C.J., and DeBRULER, GIVAN, and DICKSON, JJ., concur.

PIVARNIK, J., dissents with opinion.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

JENNIFER ANN CONN,	)	
	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631
	)	in the Supreme Court
v.	)	
	)	No. 73A01-8806-CV-201
ERIN ANDREW CONN,	)	in the Court of Appeals
	)	
Respondent-Appellee.	)	

APPEAL FROM SHELBY CIRCUIT COURT
The Honorable Robert T. Thopy, Judge Pro Tempore
Cause No. 73C01-8806-DR-127

PIVARNIK, J., Dissenting

I respectfully dissent from the position taken by the majority in this case. The majority has granted transfer from the Court of Appeals and summarily affirmed. The legal effect of this pursuant to our rules is to adopt the Court of Appeals opinion as our own. By doing so, this court has taken a position I perceive to be more social than legal, and sets a standard in our society I cannot endorse. With fullest regard and respect for my colleagues on this court and the Court of Appeals, I recognize the ultimate decision on issues such as this rests with the United States Supreme Court, and we as judges are bound under the law to recognize the judgments of that honorable court and to find it to be the law even though we might personally disagree with it for whatever reason. Judge Neal, speaking for a unanimous court, very judiciously acknowledged this when he stated:

> Although the moral concepts of abortion, as well as the assumption by the Supreme Court of the right to establish social policy, a function ordinarily reserved to legislative bodies, are troublesome to some members of this court, such personal reservations are irrelevant to the opinion here. Our duty consists only of applying the law as announced by the Supreme Court.

I agree with Judge Neal's conclusion. However, I also believe this court as the highest judicial tribunal of this State is not without responsibility to face the issues presented by our citizens and respond to them in a judicial manner. It is my view the fact situation in this case takes the issue beyond the holdings in *Roe v. Wade*, 410 U.S. 164, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, relief on by the majority. As I will demonstrate, the facts in this case take this issue to its very ultimate position by holding that Jennifer Conn had an absolute and constitutional right to destroy a life created by her and her husband in marriage, for any reason or, in fact, for no reason, and that no one, including the husband, has a right to even *inquire* into her motives or into the wisdom or advisability of such action. The opinion this court hands down today holds that Erin Conn has no right under any facts to veto Jennifer's decision and the trial court is ordered to dismiss all proceedings related to the abortion issue. This finality seems to infer it is unthinkable for a court to even consider this issue or leave it of record.

The trial court here did not enter a permanent injunction ordering Jennifer Conn to carry this child to term. Neither was it suggested the husband has an unfettered veto power over his wife's desire to abort the fetus. The court found both parties have some rights in making this decision and enjoined the wife from aborting the fetus until the parties could be heard and a judicial determination made. This was done when there was plenty of time left in the first trimester. In *Danforth*, the United States Supreme Court found there is a balancing of rights between the parties and further said that because the wife is the one who bears the child and, between the two, is

more directly and immediately affected by the pregnancy, the balance weighs in her favor. The question remains whether a majority of that court intended to foreclose the issue to the extent it meant to say in every case, under any facts and circumstances, the husband may not even inquire into the wife's decision to take this step, and cannot bring it into court to be decided as all other issues in our society, including those rights and responsibilities in marriage relationships, are decided. As the majority opinion points out in *Roe v. Wade*, (1973), 410 U.S. ___, 93 S.Ct. 705, 35 L.E.2d 147, the Supreme Court declared state statutes proscribing abortions in the first trimester unconstitutional. In regard to the first trimester, it found:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the due process clause of the Fourteenth Amendment. (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

In *Danforth*, the Supreme Court faced an issue challenging the constitutionality of a provision in a Missouri statute which required the consent of a husband before a woman could obtain an abortion during the first twelve weeks of the pregnancy. The court stated the issue:

> In *Roe* and *Doe* we specifically reserve [*sic*] decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed. 410 US at 165, n. 67, 93 S.Ct. at 733. We now hold that the state may not constitutionally require the consent of the spouse as is specified under section 3(3) of the Missouri Act, as a condition for abortion during the first twelve weeks of pregnancy.

The thrust of the *Danforth* majority was that the effect of Section 3(3) of the Missouri Act gave the husband a veto power

exercisable for any reason whatever or no reason at all. Clearly the court said a state statute cannot stand that gives the husband the absolute power to foreclose the conflict by withholding his approval. In fact, as argued in the briefs, the wife and her doctor could not finalize the decision without first having the husband's consent even if the husband's whereabouts were unknown and obtaining consent impossible. The court then stated:

> We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. *Cf. Roe v. Wade*, 410 U.S. at 153, 35 L.Ed.2d 147, 93 S.Ct. 705.

Is this language so conclusive it contemplates a wife will have an absolute veto power over any objections or considerations raised by the husband? Justices Stewart and Powell wrote a separate concurring opinion covering several issues in the case, and with reference to this issue stated:

> As to the provision of the law that requires a husband's consent to an abortion, § 3(3), the primary issue that it raises is whether the State may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a rather more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stanley v. Illinois*, 405 U.S. 645; *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535. But the Court has recognized as well that the constitution protects "a *woman's* decision whether or not to terminate her pregnancy." *Roe v. Wade*, *supra*, at 153, (emphasis added). In assessing the constitutional validity of § 3(3) we are called upon to

> choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." Ante, at 71.

Justice White wrote a dissenting opinion joined in by Chief Justice Berger and Justice Rehnquist. In his dissent in regard to the issue before us, Justice White provided:

> *Roe v. Wade*, *supra*, at 163, holds that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing "whether or not to terminate her pregnancy." 410 U.S., at 153. Section 3(3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that "since the State cannot . . . proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . . ." Ante, at 69, 49 L.Ed.2d 805. But the State is not — under § 3(3) — delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life. See *Stanley v. Illinois*, 405 U.S. 645, 651, (1972), and cases there cited. It is truly surprising the majority finds in the United States Constitution, as it must be in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to [let] it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade*, supra. These are matters which a State should be able to decide

> free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.
>
> In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe v. Wade* mentioned only the post-birth burdens of rearing a child, 410 U.S., at 153, and rejected a rule based on her interest in controlling her own body during pregnancy. *Id.*, at 154, Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo Rev Stat § 453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than § 3(3) of the Act now before us, resting as it does on precisely the same judgment.

The trial judge concluded in his findings that this issue was a viable one for a trial court to consider, as Justice White has indicated in his dissent, recognizing that the balance weighs in the wife's favor in considering the issue. He even stated he considered there to be a presumption the wife had the better of the argument and the husband would need to overcome that presumption. The *Danforth* majority indicated when a woman "with the approval of her physician but without the approval of her husband" makes a decision to terminate her pregnancy the competing interest of the parties is presented. The majority does not even require or contemplate that a physician will be involved in the wife's decision. There was no representation here the wife had even consulted a physician in making her decision. In fact, she refused under a claim of right of privacy to give any reason for her desore [*sic*] for an abortion other than to state she wanted one. Erin Conn, testified Jennifer told him unless he agreed to an adoption of the child once born, she would abort, and if there was any chance of his getting custody of the child once born, she would have an abortion. She did not tell her husband she needed an abortion for medical, emotional, or psychological reasons. There are other conflicts between these parties, as might be expected, and the trial court in

entering the temporary injunction, indicated the issues the court would weigh in determining whether a permanent injunction should ultimately issue. Those issues were:

> (a) whether the Wife has consulted with a physician, and if so, is he or she in agreement with Wife's decision to abort,
>
> (b) the likelihood of the child being born with grave mental or physical defects,
>
> (c) should Wife be ordered not to have an abortion whether she would likely suffer any harm — medical, emotional, psychological, or otherwise,
>
> (d) whether the continuation of the pregnancy and childbirth will likely interfere with Wife's education, employment, or employment opportunities,
>
> (e) whether an abortion will likely cause any harm to Husband, either emotionally, psychologically, or otherwise,
>
> (f) whether Wife is sincere in her desire for an abortion, and whether Husband is sincere in his desire that Wife not terminate the pregnancy,
>
> (g) whether the Wife will properly care for herself during the pregnancy,
>
> (h) how the expenses associated with prenatal care and delivery of the child will be paid,
>
> (i) whether the pregnancy, followed by the birth of a child, will cause financial hardship on either Husband or Wife, or their respective families,
>
> (j) whether the Husband is capable of fathering another child, and
>
> (k) whether the Husband is likely to be capable, and willing, to rear the child upon birth.

We are not faced here with a state statute that mandates the determination of every case by giving absolute veto power to one party over the decision of the other regardless of the facts and circumstances. This cases arises from the attempt of a trial

judge to make a decision involving one of the issues presented in a dissolution case in which he has full jurisdiction over all issues arising from and involved in the marriage relationship of these two people. It falls on him to hear the facts and apply the law to make a distribution of the parties' property and to provide for the care, custody, and support of the minor children. In so doing he can place the custody of the child with either party, and provide for support money and visitation to be adjusted with the other. Upon a proper finding, he can take the child from both the parties and place it with an appropriate agency, terminating their parental rights forever, and provide for the child's adoption to unknown persons to care for it. He must provide for any unborn child conceived during the marriage. The law presumes the husband to be the father of the wife's conception; that presumption can be overcome, if at all, by a showing of total non-access or total impotency. A finding that the wife conceives, even in the first trimester, fixes a responsibility on the husband to care for that child in the same manner he cares for those already born and in existence at the time of the dissolution of the marriage. It is incomprehensible to me this same trial court is foreclosed from even considering the question of whether the wife should be permitted to destroy this creation of both parties in the marital relationship merely because she wants to. At least up to now, no right has been determined to be absolute. Every right must yield and respond to rights of others and to the stability of society, in the marriage relationship and all others. In making his determinations in the dissolution action the trial court has a right to hear facts and determine whether one of the parties has committed adultery, uses drugs, uses alcohol excessively, or is in any way unstable in the management of his home and his life.

Counsel for Jennifer Conn cautions, or perhaps threatens, us that should we find this question to be a viable one to be decided by our courts, it would cause married women to simply withhold the fact of pregnancy from their husbands and take from them the opportunity to discuss the issue. This is a social, not a legal proposition, that has no place in this action. Further, it tends to polarize the parties and places them in opposite

camps, in conflict with each other. This is not only lacking in legal principle but it is in conflict with all moral, philosophical, and religious considerations of our society that have been discussed at length in decisions cited herein. I cannot but believe that one of the tenets of this society is that a marriage is a union between a man and a woman that is not characterized by polarization but represents the highest ideal and institution of unity and cooperation. Marriage forms the basic unit of the structure of our society, and indeed all civilized societies in the history of the world. Opinions of courts of all levels and of all jurisdictions as well as enactments of legislatures throughout the history of this nation, to the extent that this opinion would be heavily burdened to cite them all, have recognized the sanctity of the marriage union and the importance of preserving it. The position taken by the majority would be counter to that preservation and I cannot endorse it. I dissent.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER

GRANTING PETITION FOR TRANSFER

THE COURT now grants Appellee's "Petition for Transfer and Expedited Appeal."

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER DEBRULER
Acting Chief Justice for the Court

SHEPARD, C.J., and GIVAN, PIVARNIK, and DICKSON, JJ., concur.

DeBRULER, J., dissents to the granting of transfer.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER

REGARDING MOTION FOR STAY

With respect to Appellee's Motion for Stay, we recognize that the judgment of this Court is subject to review by the Supreme Court of the United States. In order to maintain the status quo so as to preserve this right, the trial court is ordered to vacate its temporary injunction effective 4:30 p.m. Friday, July 22, 1988.

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER O. DEBRULER
Acting Chief Justice for the Court

SHEPARD, C.J., and GIVAN and DICKSON, JJ., concur.

DeBRULER, J., dissents and votes to order temporary injunction vacated immediately.

PIVARNIK, J., dissents and votes to continue the temporary injunction.

[LIST OF COUNSEL OMITTED] [FILED JULY 12, 1988]

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

JENNIFER ANN CONN,	)	
	)	
Petitioner-Appellant	)	
	)	
-v-	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Respondent-Appellee	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Robert T. Thopy, Judge Pro-Tem
Cause No. 73C01-8806-CR-127

NEAL, J.

STATEMENT OF THE CASE

Petitioner-appellant, Jennifer Ann Conn (Jennifer), has perfected an interlocutory appeal from an order entered by the Shelby Circuit Court granting a temporary injunction in favor of her husband, Erin Andrew Conn (Erin), enjoining her from obtaining an abortion.

We reverse.

STATEMENT OF THE FACTS

Jennifer, age 19, is married to Erin, but there is pending in the Shelby Circuit Court a petition for dissolution of marriage filed by Jennifer. At the time of the entry of the temporary

injunction on June 27, 1988, Jennifer was approximately six weeks pregnant and was preparing to have an abortion. Erin filed a petition for injunction in the dissolution proceedings seeking to prevent Jennifer from obtaining the abortion. The trial court, after an evidentiary hearing, granted a temporary injunction, but at the same time certified the order for an interlocutory appeal under Ind. Rules of Procedure, Appellate Rule 4(B)(6). The trial court made special findings of fact upon which it entered conclusions of law. In its conclusions of law the trial court stated the reasons for its action as follows:

> A husband who has fathered the fetus being carried by his wife has rights in the fetus grounded in Indiana Common Law and in the 14th and 9th amendments to the United States Constitution. Those rights, in the face of his wife's desire for an abortion, must be balanced against the wife's constitutional rights to an abortion.

Record at 89.

ISSUES

Jennifer presents three issues on appeal, but because of our decision on Issue I, which is fundamental in nature, we need not address Issues II and III. Issue I is as follows:

> I. Whether the court's order enjoining Jennifer from obtaining an abortion violates her federal and state constitutional rights.

We hold that it does.

DISCUSSION AND DECISION

Dispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.E.2d 147, and *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788. These cases, as well as others cited, contain exhaustive discussions of the legal, moral, medical, historical, psychiatric, ethical, and religious aspects of abortion. We see no point in repeating those discourses here, but the reader is

referred to those cases for further edification if he so desires. We will confine our discussions to the legal holdings stated therein.

In *Roe v. Wade* the Supreme Court declared state statutes proscribing abortions in the first trimester unconstitutional. It concluded as follows:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the other.

410 U.S. at 164-65, 93 S.Ct. 732, 35 L.Ed.2d at 183-84.

Danforth involved a suit challenging the constitutionality of a provision in a Missouri statute which required spousal consent before a woman could obtain an abortion during the first twelve weeks of pregnancy. In striking down the provision as being unconstitutional, the court stated:

> In *Roe* and *Doe* we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed.

410 U.S., at 165 n. 67, 93 S.Ct., at 733. We now hold that the State may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." 392 F.Supp., at 1375. Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 386, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 729, 31 L.Ed. 654 (1888).[10] Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself

[10] We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Griswold v. Connecticut*, 381 U.S., at 486, 85 S.Ct., at 1682.

lacks that right. See *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972).[11]

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." 392 F.Supp., at 1370.

We recognize, of course that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. *Cf. Roe v. Wade*, 410 U.S., at 153, 93 S.Ct., at 726.

The dissenting opinion of our Brother WHITE appears to overlook the implications of this statement upon the

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[11] As the Court recognized in *Eisenstadt v. Baird*, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S., at 453, 92 S.Ct., at 1038 (emphasis in original).

> issue whether § 3(3) is constitutional. This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also, and more importantly, the State has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

428 U.S. at 69-71, 96 S.Ct. at 2841-42, 49 L.Ed.2d 804-06.

Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent. No case decided subsequent to *Danforth* is cited by Erin which requires spousal consent before a wife may obtain an abortion. Instead, Erin's arguments are philosophical and moral in nature. His primary argument is that a trial court may resort to a case by case balancing of the rights of a husband to procreate and have children against the right of a wife to have an abortion. In support of that argument, he points to evidence contained in the record which demonstrates that he would be a responsible father who is capable of and would adequately support the child. He also cites cases which hold that a husband has fundamental rights to procreate and rights in children that have been born and are living. He claims that those fundamental rights involve unborn children as well as children born and living. Finally, he claims that the holding in *Danforth* does not preclude this court from resorting to a balancing test of the competing rights of the husband and wife. In that argument he attempts to distinguish *Danforth*.

Erin does not contend that *Roe* and *Danforth* have been overruled, distinguished, or modified by subsequent Supreme Court decisions. Quite to the contrary, the Supreme Court in

Thornburgh v. American College of Obstetricians and Gynecologists (1986), 476 U.S. 747, 759, 106 S.Ct. 2169, 2178, 90 L.Ed.2d 779, 792, stated:

> Again today we affirm the general principles laid down in *Roe* and *Akron*.

In addition, the decisions in *Roe* and *Danforth* have been mentioned uncritically in the following Indiana cases: *Razo v. State* (1982), Ind. App., 431 N.E.2d 550; *Indiana Hospital Licensing Council v. Women's Pavilion of South Bend, Inc.* (1981), Ind. App., 420 N.E.2d 1301; *Unwed Father v. Unwed Mother* (1978), 177 Ind. App. 237, 379 N.E.2d 467.

The authorities cited and argued by Erin are either not on point or antedate *Roe* and *Danforth*. Although the philosophical, moral, ethical, and religious controversy surrounding abortion remains, the legal issues which govern the facts of this case have been, at least for the present, set to rest by those decisions and their progeny. The language and holding in *Danforth* is unambiguous and unqualified. A married woman has an unconditioned right to have an abortion in the first trimester. She is not required to seek and obtain the consent of her husband. Erin's interpretation of *Roe* and *Danforth* is strained. *Danforth* in plain language struck down the balancing argument presented here, and even used the term "for any reason" in holding that a husband has no right to veto the wife's decision to have an abortion. We need not present citation of authority to demonstrate that if a state legislature lacks the power to delegate to a husband the right to veto his wife's decision to obtain an abortion by direct statutory enactment, then certainly a court under the guise of some nebulous common law concept, cannot exceed the power denied the legislature and grant the husband the right.

Erin's argument amounts to an invitation to us to distinguish, modify, or diminish the clear holdings in those cases. Such action on our part would be presumptous and without the scope of our privilege. Although the moral concepts of abortion, as well as the assumption by the Supreme Court of the

right to establish social policy, a function ordinarily reserved to legislative bodies, are troublesome to some members of this court, such personal reservations are irrelevant to the opinion here. Our duty consists only of applying the law as announced by the Supreme Court.

Pursuant to the express holding in *Danforth*, we hold that Erin has no right to veto Jennifer's decision to obtain an abortion as such decision concerns only her. Thus, the trial court erred in granting the temporary injunction.

For the above reasons this cause is reversed and the trial court is ordered to vacate the temporary injunction. Inasmuch as we have held that Erin has no right under any facts of this case to veto Jennifer's decision to obtain an abortion, the trial court is further ordered to dismiss all proceedings related to the abortion issue.

Judgment reversed.

RATLIFF, C.J. and ROBERTSON, J. CONCUR.

[FILED JUNE 27, 1988]

STATE OF INDIANA	)	IN THE SHELBY
	) SS:	CIRCUIT COURT
COUNTY OF SHELBY	)	CAUSE NO.
		73C01-8806-DR-127

IN RE THE MARRIAGE OF:	)
	)
JENNIFER ANN CONN	)
and	)
ERIN ANDREW CONN	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Findings of Fact

Upon the issues raised by Husband's application for preliminary injunction, the Court, having heard the evidence and being duly advised, now makes the following findings of fact:

1. Jennifer Ann Conn, hereinafter referred to as "Wife," is a married, white female, age 19, residing in Shelby County, Indiana, with her father.

2. Erin Andrew Conn, hereinafter referred to as "Husband," is a married, white male, age 23, residing in Elkhart County, Indiana. Husband moved to Elkhart County in late May, 1988. In order to save money he is currently sharing living quarters with the manager of the store where he is employed.

3. Husband and Wife are married. Wife filed her petition for dissolution of marriage in the morning of June 17, 1988, and Husband filed his petition for temporary restraining order and injunction in the afternoon of the same date.

4. The Wife did not testify regarding her reasons for desiring an abortion, nor did she testify to any harm that may befall her should Husband's application for preliminary injunction be

granted. Wife's only testimony was that she is pregnant and wants an abortion.

5. The Wife is presently not in school and Husband is unaware of any plans of Wife to pursue further education.

6. The Wife is not employed.

7. The Husband has obtained a high school diploma.

8. The Husband is approximately 7 courses short of a bachelor's degree in mathematics.

9. The Husband is a second lieutenant in the United States Army Reserves.

10. The Husband is employed as an assistant store manager for Kaybee Toys and Games, a retail chain store, and has been so employed for approximately 8 months.

11. Husband previously worked for the Ball State University campus police for 3-1/2 years.

12. Husband previously worked at a Village Pantry convenience store in Muncie for a year before going on 4 months' active military duty.

13. Husband's father is employed outside the home.

14. Husband's mother is employed outside the home.

15. Husband's father is an E-5 in the Naval Reserves.

16. Husband's parents have been married 27 years.

17. Husband's older brother Tod is a married student and is in the Army National Guard.

18. Husband's brother Mike is a musician in the Army Band at Fort Benjamin Harrison.

19. The Husband earns from his regular employ $318 per week, plus a small bonus based on the profitability of the store, and further earns $200 per month from the Army Reserves.

20. The Husband anticipates attending Kaybee's six week management training school within the next few months. Upon

entering such management training, Husband anticipates receiving a raise in salary to approximately $350.00 per week. Upon concluding such training, the Husband will be eligible for a position as manager of a store. As a store manager, Husband anticipates that his salary will be in the range of $350 to $450 per week.

21. Husband's job will likely require him to make two moves out of state within the next few months.

22. The Husband and the Wife have been married for 14 months, and have an existing minor child, Crystal Rose Conn, who is 5 months old.

23. Wife's current pregnancy was unplanned. The parties were familiar with various techniques of contraception in April and May of 1988, and were employing one such technique at the time of conception.

24. The parties had previously discussed and agreed to attempt conception in August, 1988.

25. The wife's last menstrual cycle was in the first week of May, 1988. Therefore, the Wife is approximately 6 weeks pregnant computed from the end of her last menstrual cycle.

26. On June 16, Wife told Husband that she was pregnant. The same day Husband viewed papers showing Wife's positive pregnancy test results, and other papers containing instructions on what a woman should bring the day of her abortion. The same day Wife asked if Husband's insurance would pay for an abortion.

27. When told by Wife of the pregnancy, Husband denied, in a moment of anger, that he was the father.

28. When told by Wife of her desire for a divorce Husband threatened suicide. He said he would take the biggest gun he could find and kill himself. During his upset, he cried and crawled on the floor on his hands and knees. Also, while Husband was riding in a car with Wife driving, he jumped back and forth several times between the front seat and back, and banged his head against the ceiling of the car.

29. Upon leaving the home of Wife on June 16, after hearing of her desire for an abortion, Husband went directly to the office of his Rushville attorney, John Worth, arriving between 10:00 A.M. and 11:00 A.M. June 16. His petition was filed seeking the temporary restraining order the following afternoon.

30. Prior to the filing of his petition seeking a restraining order and an injunction preventing the abortion, Husband had not discussed with Wife his desire that she not seek an abortion.

31. During the discussion between the parties on June 16, Wife told Husband they could not financially afford another child. She also said that unless Husband agreed to an adoption of the child once born, she would abort. She also said if there was any chance of Husband getting custody of the child once born, she would have an abortion.

32. The Wife has had no prior abortions.

33. Husband wants Wife to bear and give birth to the unborn child she is carrying so that he can raise, nurture the child, and give the child everything he has.

34. If the Wife has an abortion, Husband said he will feel a very big loss, and he compared the loss to the cutting off of his own arms and legs.

35. Husband has insurance to pay Wife's prenatal care expenses, as well as the medical and hospital expenses associated with the birth of the baby.

36. Husband feels financially secure and capable of raising the child to be born of this pregnancy. He said he would not need his Wife to provide financial support for the child.

37. Wife did not tell her Husband that she needed the abortion for medical, emotional, or psychological reasons. Husband is aware of no unusual risks facing his Wife if she carries the pregnancy to full term. Husband is unaware of any family reasons requiring the abortion.

Conclusions of Law

Having found the facts to be as recited above, the Court now makes the following conclusions of law:

38. This Court has jurisdiction to hear this cause.

39. The Husband has standing to seek injunctive relief in his Wife's action for dissolution of marriage.

40. The parties' status as husband and wife establishes a presumption that Husband is the father of any child due to be born during the marriage or within 300 days after the marriage is terminated by death, annulment or dissolution. Ind. Code § 31-6-6.1-9(a).

41. Under Indiana law, fathers have legal rights in their children, including the right to have custody, to care for their children, raise and nurture them.

42. There is no Indiana statute, nor decision by an Indiana court of appellate jurisdiction, which address the matters raised by the Husband's request for preliminary injunction. The United States Supreme Court has not addressed the issue. The decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), struck down a Texas statute which interfered with a woman's exercise of her 14th Amendment privacy right to have an abortion during the first or second trimester of pregnancy. The United States Supreme Court decision in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), declared unconstitutional a Missouri statute which gave husbands unilateral veto power over any woman's decision to have an abortion. Neither *Roe* nor *Danforth* addressed the question of whether or not a husband's interests in continuing the pregnancy need be recognized and balanced against a wife's decision to have an abortion.

43. A husband who has fathered the fetus being carried by his wife has rights in the fetus grounded in Indiana common law and in the 14th and 9th Amendments to the United States Constitution. Those rights, in the face of his wife's desire for an abortion, must be balanced against the wife's constitutional rights to an abortion.

44. The balancing of those rights of the Husband with the right of the Wife to obtain an abortion is an entirely appropriate judicial function where such rights are asserted.

45. If the Wife is not enjoined from obtaining an abortion, the Husband will suffer a grave loss — the loss of a potential opportunity to raise, nurture, and enjoy the companionship of the child likely to be born as a result of this pregnancy.

46. The purpose of a preliminary injunction is to preserve the status quo pending ajudication of a case on its merits. In consideration of the following factors, the Court grants Husband's application for a preliminary injunction:

(a) Husband's remedies at law are inadequate thus causing irreparable harm pending resolution of the issues raised by his request for a permanent injunction if his application is not granted,

(b) Husband has demonstrated at least a reasonable likelihood of success at the hearing on the request for permanent injunction by establishing a prima facie case; in other words, the Husband has presented sufficient credible evidence on the factors to be weighed by this Court which are identified at paragraph 47 below.

(c) The threatened injury to Husband outweighs the threatened harm that the granting of this preliminary injunction may inflict upon Wife, and

(d) the public interest will not be disserved by the grant of a preliminary injunction.

47. Following the trial yet to be held on Husband's request for a permanent injunction, and in determining whether a permanent injunction should ultimately issue in this case, this Court will weigh the following factors in making its decision:

(a) whether the Wife has consulted with a physician, and if so, is he or she in agreement with Wife's decision to abort,

(b) the likelihood of the child being born with grave mental or physical defects,

(c) should Wife be ordered not to have abortion whether she would likely suffer any harm — medical, emotional, psychological, or otherwise,

(d) whether the continuation of the pregnancy and childbirth will likely interfere with Wife's education, employment, or employment opportunities,

(e) whether an abortion will likely cause any harm to Husband, either emotionally, psychologically, or otherwise,

(f) whether Wife is sincere in her desire for an abortion, and whether Husband is sincere in his desire that Wife not terminate the pregnancy,

(g) whether the Wife will properly care for herself during the pregnancy,

(h) how the expenses associated with prenatal care and delivery of the child will be paid,

(i) whether the pregnancy, followed by birth of a child, will cause financial hardship on either Husband or Wife, or their respective families,

(j) whether the Husband is capable of fathering another child, and

(k) whether the Husband is likely to be capable, and willing, to rear the child upon birth.

48. In ultimately deciding the question of whether Husband's request for a permanent injunction should be granted, and because of the greater physical and emotional burden on Wife of pregnancy and childbirth, this Court will recognize a presumption that Wife is entitled to an abortion, and will require Husband to overcome that presumption by the "clear and convincing evidence" standard.

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Court hereby Orders that:

(a) the Wife, during the pendency of this action and until further order of this Court, is hereby enjoined from having an abortion to terminate her pregnancy;

(b) the Wife is ordered to provide a copy of this Court's Order to any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or any employee thereof, which she might consult regarding the termination of her pregnancy;

(c) any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or employee thereof, with notice of this Order, is hereby enjoined from performing an abortion on the Wife during the pendency of this action;

(d) nothing in this Order shall prohibit the termination of the Wife's pregnancy in a medical emergency in a circumstance which precludes prior resort to this Court;

(e) the Husband is ordered to pay for all reasonable and necessary medical expenses for the Wife related to prenatal care during the pendency of this action;

(f) the final hearing in this matter on Husband's request for a permanent injunction shall be promptly scheduled by the Court following consultation with counsel for the parties;

(g) the parties shall promptly notify the Court of the spontaneous abortion, or an induced abortion under paragraph (d) of this order,

(h) this Court certifies, pursuant to Rule 4(B)(6), Rules of Appellate Procedure, that

(1) Wife will suffer substantial injury if this order is erroneous and the determination that it is erroneous is withheld until after judgment, and

(2) This order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

ORDERED and decreed this 27th day of June, 1988, at 2:10 o'clock P.M.

ROBERT T. THOPY
Judge Pro Tempore
Shelby Circuit Court

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF:	)
JENNIFER ANN CONN,	)
	)
Petitioner-Appellant,	) No. 73S01-8807-CV-631
	) in the Supreme Court
v.	)
	) No. 73A01-8806-CV-201
ERIN ANDREW CONN,	) in the Court of Appeals
	)
Respondent-Appellee.	)

FINAL DECREE

[The final decree in this case consists of the following:

1. The order of the Indiana Supreme Court adopting the opinion of the Indiana Court of Appeals and affirming its judgment. See p. 1a, *supra*.

2. The judgment of the Indiana Court of Appeals:

> For the above reasons this cause is reversed and the trial court is ordered to vacate the temporary injunction. Inasmuch as we have held that Erin has no right under any facts of this case to veto Jennifer's decision to obtain an abortion, the trial court is further ordered to dismiss all proceedings related to the abortion issue.
>
> Judgment reversed.

See p. 20a, *supra*.

3. The Final Docket Entry of the Shelby Circuit Court dismissing the action. See p. 30a, *infra*.]

STATE OF INDIANA	)	IN THE SHELBY CIRCUIT
	)	COURT
	) SS:	
COUNTY OF SHELBY	)	CAUSE NO.
	)	73C01-8806-DR-127

IN RE THE MARRIAGE OF:)
)
JENNIFER ANN CONN)
and)
ERIN ANDREW CONN)

FINAL DOCKET ENTRY

[Judge Charles D. O'Connor has caused the following entry to be made on the Docket of the Shelby Circuit Court:]

July 22, 1988

Pursuant to the Order of the Indiana Supreme Court dated July 12, 1988, this Court now dissolves the preliminary injunction entered herein on June 27, 1988, and Orders that all matters pertaining to issue of abortion be, and they are hereby, dismissed effective 4:30 P.M.

[FILED JULY 18, 1988]

IN THE SUPREME COURT OF INDIANA

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	
	)	
-v-	)	CAUSE NO. 73S01-8807-CV-631
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	

ORDER DENYING "PETITION FOR REHEARING".

THIS COURT, having heretofore entered an Order affirming an opinion of the Court of Appeals, involving a first trimester pregnancy, now hereby DENIES Appellee's Petition for Rehearing.

DONE AT INDIANAPOLIS, INDIANA this 18th day of July, 1988.

RANDALL T. SHEPARD
Chief Justice of Indiana

All Justices concur, except Pivarnik, J., who votes to grant the Petition for Rehearing; and Givan, J., who is not participating.

[FILED JULY 18, 1988]

IN THE

INDIANA SUPREME COURT

NO. 73S01-8807-CV-631

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	Appeal From
	)	Indiana Court of Appeals
v.	)	First District
	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	
	)	

PETITON FOR REHEARING

Petitioner-appellee, Erin Andrew Conn, by counsel, pursuant to Indiana Rules of Appellate Procedure, Rule 11(A), petitions this Court to rehear the above-captioned case and to affirm the Shelby Circuit Court. In support of this Petition, Erin Conn states:

1. This Court has decided this cause of action adversely to Erin Conn in an order, filed July 15, 1988, adopting the written opinion of the Court of Appeals.

2. The opinion of this Court is in error for the reason that it held, in effect, that the Indiana constitutional provision establishing the Indiana judicial system, Ind. Constitution Art. I, § 12, Art. VII, §§ 1, 8, and Indiana statutes establishing the powers and jurisdiction of Indiana circuit courts, I.C. § 33-4-2-1 (circuit courts "shall have power to issue and direct all processes . . . necessary to the regular execution of the law), I.C. § 33-4-2-3 (circuit "courts shall have power to

make . . . injunctions"), I.C. § 33-4-6-1 (establishing the Shelby Circuit as a court of general jurisdiction, including equitable powers, excluding jurisdiction over juvenile matters only), would be unconstitutional as applied, under the United States Constitution, if applied to allow injunctions prohibiting abortions on a balancing of parental rights, due to the holding of the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* (1976), 426 U.S. 52. *Danforth* does not prohibit the balancing of the rights of a husband in his unborn child with the right of his wife to abort their child, and enjoining her from aborting where, on the facts of the particular case, his rights and interests outweigh hers.

3. The opinion of this Court is erroneous for holding that *Danforth* controls, because *Danforth* held that a husband has no absolute veto or consent right over the abortion decision of his wife and mother of his unborn child. This Court held "that Erin has no right to veto Jennifer's decision to obtain an abortion . . . . " A veto or consent is not what the Husband sought, nor is it what the Shelby Circuit Court granted to him. Rather, the Husband has requested a judicial balancing of his rights and interests with those of his wife in this context. That is what the Shelby Circuit Court did at the hearing on the preliminary injunction. This Court missed the point of the holding of the circuit court by its erroneous focus on a spousal veto.

4. The opinion of this Court is also erroneous for failing to recognize the Due Process and Equal Protection rights of the Husband, under the Fourteenth Amendment of the United States Constitution, to a balancing of his rights and interests in his child with the right and interests of his Wife to abort the child based upon a correct standard of proof.

5. The opinion of this Court is erroneous for the further reason that it failed to reverse the incorrect standard imposed on Erin Conn in the balancing employed by the Shelby Circuit Court, from which Erin Conn has cross-appealed. The trial court imposed on the Husband a presumption favoring his Wife and a "clear and convincing evidence" burden of proof. The holding of the Circuit Court and this Court on this issue was erroneous and violative of the Due Process and Equal Protec-

tion rights of Erin Conn under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, the undersigned respectfully requests this Court to rehear this cause, pursuant to the Indiana Rules of Procedure, Appellate Rule 11(A), and promptly affirm the Shelby Circuit Court, with the exception of the erroneous presumption and burden of proof from which Husband has cross-appealed.

Respectfully submitted,

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IN THE

INDIANA SUPREME COURT

NO. 73A01-8806-CV-201

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	Appeal From
	)	Indiana Court of Appeals
v.	)	First District
	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	
	)	

PETITION FOR TRANSFER AND EXPEDITED APPEAL

Petitioner-appellee, Erin Andrew Conn, by counsel, pursuant to Indiana Rules of Appellate Procedure, Rule 11(B), petitions this Court to transfer and take jurisdiction of this appeal and to vacate the judgment of the Indiana Court of Appeals, which vacated a preliminary injunction granted by the Shelby Circuit Court. In support of this appeal, Erin Conn states:

1. The Court of Appeals has decided this cause of action adversely to Erin Conn in a written opinion filed on the 12th day of July, 1988.

2. No petition for rehearing has been filed with the Court of Appeals. Petitioner appeals directly to this Court, pursuant to Appellate Rule 11(B), without petitioning for rehearing, due to the emergency nature of this appeal.

3. On June 24, 1988, a hearing was conducted before the Shelby Circuit Court to determine whether the rights and

interests of Erin Andrew Conn, the Husband, in his unborn children outweighed the right and interests of Jennifer Conn, his Wife, in aborting their unborn child.

4. On Monday, June 27, 1988, the Circuit Court issued Findings of Fact, Conclusions of Law, and its Order, preliminary enjoining the Wife from obtaining an abortion. This order is appealable under Appellate Rule 4(B)(3). The Circuit Court also certified, under Appellate Rule 4(B)(6)(a) and (b), that its Order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case, and that Jennifer Conn will suffer substantial injury if the order is erroneous and not corrected before final judgment.

5. The opinion of the Court of Appeals is in error for the reason that it held, in effect, that the Indiana constitutional provision establishing the Indiana judicial system, Ind. Constitution Art. I § 12, Art. VII, §§ 1, 8, and Indiana statutes establishing the powers and jurisdiction of Indiana circuit courts, I.C. § 33-4-2-1 (circuit courts "shall have power to issue and direct all processes . . . necessary to the regular execution of the law), I.C. § 33-4-2-3 (circuit "courts shall have power to make . . . injunctions"), I.C. § 33-4-6-1 (establishing the Shelby Circuit as a court of general jurisdiction, including equitable powers, excluding jurisdiction over juvenile matters only), would be unconstitutional as applied, under the United States Constitution, if applied to allow injunctions prohibiting abortions on a balancing of parental rights theory, due to the holding of the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52. *Danforth* does not prohibit the balancing of the rights of a father and husband in his unborn child with the right of his wife, mother of their unborn child, to abort their unborn child, and enjoining her from aborting where, on the facts of the particular case, his rights and interests outweigh hers.

6. The opinion of the Court of Appeals is erroneous for holding that *Danforth* governs because *Danforth* held that a husband has no veto or consent right over the abortion decision of his wife and mother of his unborn child. The Court of Appeals

held "that Erin has no right to veto Jennifer's decision to obtain an abortion . . . .". A veto or consent is not what the Husband sought, nor is it what the Shelby Circuit Court granted to him. Rather, the Husband has requested a judicial balancing of his rights and interests with those of his wife in this context. That is what the Shelby Circuit Court did at the hearing on the preliminary injunction. The Court of Appeals missed the point of the holding of the circuit court by its erroneous focus on a spousal veto.

7. The opinion of the Court of Appeals is also erroneous for failing to recognize the Due Process and Equal Protection rights of the Husband, under the Fourteenth Amendment of the United States Constitution, to a balancing of his rights and interests in his child with the right and interests of his Wife to abort the child based upon a correct standard of proof.

8. The opinion of the Court of Appeals is erroneous for further reason that it failed to reverse the incorrect standard imposed on Erin Conn in the balancing employed by the Shelby Circuit Court, from which Erin Conn has cross-appealed. The trial court imposed on the Husband a presumption favoring his Wife and a "clear and convincing evidence" burden of proof. The holding of the Circuit and Appellate Courts on this issue was erroneous and violative of the Due Process and Equal Protection rights of Erin Conn under the Fourteenth Amendment to the United States Constitution.

9. This appeal involves the rights of a Husband and father to the care, custody, control, and companionship of his unborn child, his right to procreate, and his rights in his family relations, which rights are substantial and of constitutional dimension.

10. The precise issue before the Court regarding the father's rights has not been determined by either the United States Supreme Court or this Court and, therefore, involves a substantial question of law of great public importance.

11. The Husband, Erin Conn, is married to Jennifer Conn, his Wife. The Husband is a white male, age 23, is a second

lieutenant in the United States Reserves, is approximately 7 courses short of a bachelor's degree in mathematics, is an assistant manager of a retail chain store, has insurance to pay for his wife's prenatal and childbirth expenses, and wants his Wife to carry the unborn child to term so he can raise, nurture, and provide for the child.

12. The Husband has testified that he would suffer a profound loss if his child were aborted.

13. The Husband has testified that he feels capable of raising and providing for the child alone, if necessary, which he desires to do.

14. Husband and Wife had previously discussed conception and agreed to attempt it in August, 1988.

15. The Wife is a white female, age 19, and filed for dissolution of marriage on June 17, 1988, on which day Husband also filed for a temporary restraining order preventing her abortion, following which this preliminary injunction was issued.

16. Wife gave no reasons for her desire for an abortion at the hearing on the preliminary injunction. Husband is aware of no medical, psychological, family, education, or employment reasons why his Wife would desire an abortion.

17. On June 16, 1988, Wife told husband they could not financially afford another child. She further warned Husband that she would abort unless he agreed to put the unborn child up for adoption upon its birth. The trial court also found that the Wife said that she would abort if there was any chance of the Husband receiving custody of the child at birth.

18. The Shelby Circuit Court found on June 27, 1988, that the Wife was approximately 6 weeks pregnant, calculated from the end of her last menstrual cycle.

19. Due to the nature of this case, a speedy determination of the issues raised in this appeal is desirable.

WHEREFORE, the undersigned respectfully requests this Court to transfer this appeal from the Indiana Court of

Appeals to the Indiana Supreme Court, pursuant to the Indiana Rules of Procedure, Appellate Rule 11(B), and promptly reverse the order of the Court of Appeals and affirm the order of the Shelby Circuit Court, with the exception of the erroneous presumption and burden of proof from which Husband cross-appealled in the court below. The undersigned also requests that this Court grant the accompanying motion for a Stay of the Order of the Court of Appeals.

Respectfully submitted,

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STATUTES INVOLVED

Ind. Const. art. I, § 12

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

Ind. Const. art VII, § 1

The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish.

Ind. Const. art. VII, § 8

The Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law.

Ind. Code § 33-4-2-1 Process of courts

Sec. 1. They shall have power to issue and direct all processes, to courts of inferior jurisdiction, and to corporations and individuals which shall be necessary to the regular execution of the law.

Ind. Code § 33-4-2-2 Form of Process

Sec. 2. Where there shall be occasion for any process for which no form is prescribed by law, such court shall frame a new writ in conformity with the principles thereof.

Ind. Code § 33-4-2-3 Judgments; sentences; orders and injunctions

Sec. 3. Such courts shall have power to make all proper judgments, sentences, decrees, orders and injunctions, and to issue all processes, and to do such other acts as may be proper to carry into effect the same, in conformity with the constitution and laws of this state.

Ind. Code § 33-4-6-2 Jurisdiction of court

Sec. 2. The Shelby Circuit Court shall have and exercise concurrent, coordinate and coextensive jurisdiction with the Shelby Superior Court in all civil actions and proceedings, at law or in equity; in divorce and special statutory proceedings and actions; probate matters and proceedings; actions by and against administrators, executors, guardians, trustees, and other fiduciaries and personal representatives, including but not limited to will contests, actions to resist probate of wills, and claims against estates; and in criminal proceedings, actions and matters.

Ind. Code § 31-1-11.5 DISSOLUTION OF MARRIAGE

31-1-11.5-1 Purposes; rules of construction

Sec. 1. Purposes; Rules of Construction. (a) This chapter shall be construed and applied to promote its underlying purposes and policies.

b. The underlying purposes and policies of this chapter are:

***

(2) to provide for the appropriate procedures for the dissolution of marriage;

(3) to provide for the disposition of property, child support and child custody;

***

Ind. Code § 31-1-11.5-2 Definitions

Sec. 2. Definitions. When used in this chapter:

(a) The term "court" shall mean the circuit, superior or other courts of this state upon which jurisdiction to enter divorce decrees or dissolution decrees has been or may be conferred.

(b) The term "dissolution decree" means a judicial decree entered in a proceeding for the dissolution of marriage which has the effect of terminating the marriage and restoring the

parties to the state of unmarried persons and which may include those matters set out in section 9 of this chapter.

(c) The term "child" means a child or children of both parties to the marriage and includes children born out of wedlock to such parties as well as children born or adopted during the marriage of such parties.

Ind. Code § 31-1-11.5-7 Provisional orders

***

(d) The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper and may issue a temporary restraining order, a custody order or an order for possession of property to the extent it deems proper.

No. 88-347

Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

ERIN ANDREW CONN,

Petitioner,

—v.—

JENNIFER ANN CONN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a man claiming responsibility for a woman's pregnancy has a federal constitutional right that would support the issuance of a permanent injunction preventing the woman from having an abortion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-347

ERIN ANDREW CONN,

Petitioner,

—v.—

JENNIFER ANN CONN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jennifer Conn submits this brief in opposition to the petition for certiorari filed by Erin Conn, which seeks review of the judgment entered by the Indiana Supreme Court in this action, *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988). Mr. Conn's petition fails to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the Indiana Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 17.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Erin Conn offers three grounds for this Court's jurisdiction under 28 U.S.C. § 1257(3) to review the judgment of the Indiana Supreme Court. First, Mr. Conn seeks to invoke

the jurisdiction of this Court based on "the fact that the validity of state statutes, as applied, have been called into question under the Constitution of the United States." Pet. at 2.[1] This is plainly incorrect. No state statute granting substantive rights is involved in this case. As the Indiana Supreme Court expressly found, "Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent." App. at 18a. Mr. Conn therefore contends that the Indiana statutes that confer general equity jurisdiction upon the courts were in effect held unconstitutional as applied.

In fact, in holding that the injunction issued against respondent Jennifer Conn was unconstitutional, the Indiana Supreme Court invalidated an *exercise of authority* under Indiana Code § 33-4-2-3 (the statute granting state courts the authority to issue injunctions) and *not the validity of the statute itself*. An objection to an exercise of authority under a statute whose validity is not attacked cannot establish U.S. Supreme Court jurisdiction over a state court decision.[2]

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1 Citations to Mr. Conn's "Petition For a Writ of Certiorari To the Indiana Supreme Court" will be in the form "Pet. at _____." Citations to the appendix to that petition will be in the form "App. at _____." Citations to the record will be in the form "R. _____."

2 For example, in *Kulko v. California*, 436 U.S. 84, 90 n. 4 (1978), the Court stated: "Appellant did not argue below that this statute was unconstitutional, but instead argued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of in personam jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction." Similarly, the Indiana courts in this case did not question the validity of Ind. Code § 33-4-2-3, but rather decided whether the Constitution itself would permit a particular type of injunction. *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (quoting *Phillips v. United States*, 312 U.S. 246, 252 (1941)) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . ."); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1, 6 (1920) ("[T]he mere objection to an exercise of authority under a statute, whose validity is not attacked cannot be made the basis of a writ of error from this court.").

Moreover, Mr. Conn failed to make this claim in "an explicit and timely" manner in the Indiana courts, as is required to establish this Court's jurisdiction. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (quoting *Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945)). The first time Mr. Conn ever mentioned any of the state statutes upon which he seeks to invoke this Court's jurisdiction was in his petition for rehearing in the Indiana Supreme Court. This Court has held that raising a federal question for the first time in a petition for rehearing is insufficient to establish U.S. Supreme Court jurisdiction under § 1257.[3]

Second, Mr. Conn suggests as an additional ground for jurisdiction "the assertion by the Petitioner . . . of rights under the Fourteenth and Ninth Amendments of the Constitution." Pet. at 2. Mr. Conn's claim that the Constitution confers upon him the right to prevent Ms. Conn's abortion is entirely without merit and therefore fails to raise a substantial federal question. As discussed in more detail below, no state statute purports to give Mr. Conn this right. Further, Mr. Conn does not cite a single case—and Ms. Conn submits that none exists—that supports his claim that the Constitution gives him the right to force Ms. Conn to submit to what amounts to compulsory pregnancy and forced childbirth. *See infra* pp. 9-16. A mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy," no jurisdiction lies. *Equitable Life Ins. Soc. v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

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3 *See Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 258-59 (1920) ("The only ground mentioned . . . upon which this writ could be sustained is conflict between specified sections of the [state] statutes . . . and the Federal Constitution. But this point came too late, being first advanced below on the motion for rehearing."); *see also Slagle v. Ohio*, 366 U.S. 259, 264 (1961); *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629 (1960); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Wilson v. Cook*, 327 U.S. 474, 483 (1946).

Finally, Mr. Conn relies for jurisdiction on "the assertion of the respondent . . . of rights under the Fourteenth Amendment of the Constitution." Pet. at 2. Ms. Conn, like every woman in this country, clearly has a federal constitutional right to choose to have an abortion, and this Court has jurisdiction to consider issues involving that right. The Court, however, should decline to exercise jurisdiction. The Indiana Supreme Court properly applied dispositive U.S. Supreme Court precedent affirming Ms. Conn's constitutional rights. Moreover, this Court need not even consider Ms. Conn's constitutional rights unless it creates for a man an affirmative constitutional right to use the power of the government to interfere with a woman's private and constitutionally protected right to choose to have an abortion.

COUNTERSTATEMENT OF THE CASE

In the morning of June 17, 1988, Jennifer Conn filed a dissolution of marriage petition in the Shelby Circuit Court. That same afternoon, Erin Conn filed a petition for a temporary restraining order ("TRO") prohibiting Jennifer Conn from terminating her first trimester pregnancy. R. 246. The court, the Honorable Robert T. Thopy sitting *pro tempore*, issued the requested TRO that afternoon without notice to Ms. Conn and without the submission of any legal memorandum supporting the motion. R. 233. The court also issued an "Order to Show Cause," ordering Ms. Conn to appear at a hearing and "show cause, if any there be, why the Temporary Restraining Order restraining [Ms. Conn] from having an abortion should not be made a preliminary injunction." R. 234.

On June 23, 1988, Ms. Conn filed a "Motion to Dissolve Temporary Restraining Order and Motion For Immediate Ruling or, Alternatively, For Immediate Hearing," accompanied by a supporting memorandum. R. 192, 198 & 230. Ms. Conn argued that the TRO violated her constitutional right to choose to have an abortion, recognized in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, and that Mr. Conn's claim to a constitutional right to interfere with her decision to have an abortion

was meritless. On June 24, 1988, she filed a "Motion to Vacate Order To Show Cause," R. 148, and appeared, pursuant to the court's order, at the June 24, 1988 hearing. R. 7. At that hearing, the court denied Ms. Conn's motion to dissolve the TRO. R. 4. Over Ms. Conn's objections, the court held an evidentiary hearing on whether she should be preliminarily enjoined from having an abortion and ordered her to testify when called as a witness by Mr. Conn. R. 8.

Because Ms. Conn objected to the jurisdiction of the court, the constitutionality of the restraining order, and the judicial inquiry into her decision regarding her pregnancy, she testified only that she was pregnant and wanted an abortion. R. 9. She refused to reveal the private and intimate details of her decision at the hearing, which was held in open court with the press and the public in attendance. R. 73-74. Mr. Conn and his father testified, over Ms. Conn's objections, concerning highly personal matters including the couple's use of contraception and their sexual habits. R. 24-25, 27, 30.[4]

On June 27, 1988, Judge Thopy issued a preliminary injunction ordering Jennifer Conn not to terminate her pregnancy. R.

4 As is apparent from the Shelby Circuit Court's description of Mr. Conn's testimony, he was extremely upset that Ms. Conn wanted a divorce and he clearly wanted to continue their relationship.

> When told by Wife of her desire for a divorce Husband threatened suicide. He said he would take the biggest gun he could find and kill himself. During his upset, he cried and crawled on the floor on his hands and knees. Also, while Husband was riding in a car with Wife driving, he jumped back and forth several times between the front seat and back, and banged his head against the ceiling of the car.

App. at 23a. It is also clear that Mr. Conn initially was unhappy about the unplanned pregnancy:

> When told by Wife of the pregnancy, Husband denied, in a moment of anger, that he was the father.
>
> . . . .
>
> Wife's current pregnancy was unplanned. The parties were familiar with various techniques of contraception in April and May of 1988, and were employing one such technique at the time of conception.

Id. Mr. Conn testified further that, prior to seeking an injunction prohibiting the abortion, he never even told Ms. Conn that he did not want her to have the abortion. *Id.* at 24a.

85. The court certified the issue for an interlocutory appeal, finding that Ms. Conn "will suffer substantial injury if this order is erroneous and the determination that it is erroneous is withheld until after judgment." App. at 28a. Jennifer immediately appealed the decision to the Indiana Court of Appeals, and on July 12, 1988 that court unanimously reversed the trial court's injunction. App. at 13a.

On July 15, 1988, the Indiana Supreme Court granted transfer in the case and, by a vote of four to one, adopted the decision of the Indiana Court of Appeals as its own. App. at 1a. The Court, however, granted Mr. Conn's request to continue the injunction prohibiting Ms. Conn's abortion for an additional week. App. at 12a. Mr. Conn thereafter applied to Justice Stevens and then to Justice Rehnquist for stays of the Indiana appellate court orders. Both Justices denied the applications without opinion. *Conn v. Conn*, No. A88-55 (U.S. July 22, 1988) (letter from Clerk of the Court). On July 22, 1988, thirty-five days after initially enjoining Ms. Conn from terminating her pregnancy, the circuit court dissolved its injunction. App. at 30a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE INDIANA SUPREME COURT

A. Every Woman Has A Constitutional Right To Decide Whether or Not To Terminate Her Pregnancy

As the Indiana Supreme Court properly held, "[d]ispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." App. at 14a (citations omitted).

The United States Constitution guarantees every woman the fundamental right to decide, free from government intrusion, whether to end her pregnancy. The U.S. Supreme Court first clearly recognized this right to choose abortion in 1973, *see Roe*

v. Wade, 410 U.S. 113 (1973), and has since consistently and unequivocally reaffirmed the right in numerous decisions, *see, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).[5] Most recently, the Court held that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 773 (1986).

In 1976 this Court decided the precise issue presented here; the Court rejected the claim that the state may deprive a woman of her constitutional right to choose to have an abortion in order to promote the interests and wishes of her husband. *See Danforth*, 428 U.S. 52. The Missouri law at issue in *Danforth* prohibited a married woman from having an abortion without her husband's consent. The Court struck down that law and made clear that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *Id.* at 69-71.

Mr. Conn argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas Mr. Conn was seeking "judicial consideration of competing constitutional rights and interests on a case by case basis." Pet. at 12. This suggested distinction is insignificant. As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." 428 U.S. at 71. Mr. Conn quite definitely seeks the creation of a right that would allow a man to use the

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5 *Roe v. Wade* and its progeny make clear that a state is barred not only from depriving a woman of her right to decide whether to have an abortion, but also may not interfere with her decisionmaking process. For example, the Court has held unconstitutional statutes that forced women to wait a specified period of time before obtaining an abortion, *Akron*, 462 U.S. at 450-51, that required abortions to be performed in hospitals, *id.* at 431-33, and that imposed biased or "lengthy and inflexible" informed consent requirements, *Thornburgh*, 476 U.S. at 759-63; *Akron*, 462 U.S. at 442.

courts to veto a woman's decision to have an abortion. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already done the balancing of interests sought by Mr. Conn. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." 428 U.S. at 69. Nevertheless, the Court concluded that a woman's right to make the abortion decision outweighs her husband's interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor.*" *Id.* at 71 (emphasis added).

Roe and its progeny make clear that a case-by-case judicial inquiry into a woman's abortion decision would itself be unconstitutional. *Cf. Thornburgh*, 476 U.S. at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring)) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."); *Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (abortion decision may not be subject to ad hoc determinations of hospital committee). An individual woman's personal circumstances are legally irrelevant. Recognizing the unparalleled importance of a woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.[6]

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6 Faced with having to explain to a court their reasons for choosing abortion and having to expose intimate details of their lives to judicial and public scrutiny, some women would instead resort to unsafe, ille-

(*footnote continued*)

B. The Indiana Supreme Court Did Not Deprive Mr. Conn Of Any Federal Right

1. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion

As explained above, the Court in *Danforth* considered the interests that a woman's husband may possess in the outcome of her pregnancy and concluded that those interests cannot justify depriving the woman of her abortion right. Thus, the Court implicitly rejected Mr. Conn's claim that he possesses constitutional rights that outweigh Ms. Conn's abortion right. *Dan-*

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gal abortions, despite the great risks to their health and lives. Although a private abortion is a legal and constitutionally protected choice, some women nevertheless have illegal abortions. A study of seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that "[a] desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982). Given that nine of seventeen women lost their lives due to a desire to keep their abortions secret during a time when their privacy was protected, that number inevitably would be far greater if Mr. Conn's "case-by-case" review were lawful.

Moreover, the purely voluntary role that men play in women's abortion decisions would likely be hurt under Mr. Conn's approach. Mr. Conn testified that Ms. Conn discussed with him the fact that she was pregnant. R. 24. The vast majority of women who have abortions inform the man involved. Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Social Research 183 (Apr. 1987). A study of 2,337 women seeking abortions at a clinic in St. Louis, Missouri revealed that 89.5% of the women had told the man involved about the pregnancy, and 92.8% of the married women had told their husbands. *Id.* at 185. If, however, a man had the right to seek a court order prohibiting a woman from obtaining an abortion, a woman considering abortion would be discouraged from choosing to consult with the man involved. The result could be far fewer men having any opportunity at all to influence women's abortion decisions and far less communication among couples.

forth is therefore dispositive of Mr. Conn's constitutional claims.

Even absent *Danforth* and the Court's other dispositive abortion cases Mr. Conn could not prevail. His assertion that Ms. Conn's abortion decision implicates his constitutional rights is frivolous. The federal constitutional rights cited by Mr. Conn—the right to procreate, rights derived from a marital relationship, and the right to raise one's children—protect a person only from *governmental* action.[7] Every case cited by Mr. Conn as support for his constitutional claims involves government action affirmatively interfering with the autonomy of private individuals.[8] This is not such a case.

For example, the Constitution certainly protects Mr. Conn's right to be free from government intrusion into his decision to have a child. But it is up to Mr. Conn, not lower court judges, to find a woman who will have a child with him. No individual,

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7 "The first section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the States. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

8 *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (*state* may use preponderance of evidence standard in paternity proceeding); *Lehr v. Robertson*, 463 U.S. 248 (1983) (*state* not required to provide hearing before severing parental rights of absentee parents); *Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Caban v. Mohammed*, 441 U.S. 380 (1979) (*state* may not practice sex discrimination in adjudicating parental unfitness); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (*state* not required to provide veto over adoption to unwed, absentee father); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on unmarried status); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Prince v. Massachusetts*, 321 U.S. 158 (1943) (*state* may restrict public sale of merchandise by minors, including sale of religious publications); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (*state* may not forbid teaching of foreign languages in private schools).

male or female, has a constitutional right to have a court compel another to procreate with him or her. To the contrary, the Constitution guarantees that the government will not interfere with the reproductive choices made by any individual.

Justice Stevens recently noted this fundamental flaw in Mr. Conn's claim when he denied an application for an injunction in a legally and factually similar case, *Doe v. Smith*, 108 S. Ct. 2136 (1988). In refusing to grant the injunction, Justice Stevens wrote "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State of Indiana or any other state governmental subdivision." *Id.* at 2137.

The constitutional rights asserted by Mr. Conn act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). The court in *Doe* rejected a request by a man to enjoin his wife's abortion, concluding "[w]e find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.* Mr. Conn improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women to the wills of their husbands.[9]

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9 Mr. Conn contends that he has a constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to a judicial consideration of his constitutional claims. *See* Pet. at 28-30. Because no state action is involved, Mr. Conn has no substantive constitutional right that is implicated by Ms. Conn's private decision to have an abortion. Mr. Conn therefore is not entitled under the due process clause to a hearing regarding Ms. Conn's abortion decision. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

(*footnote continued*)

a. Right to Procreate

The implications of Mr. Conn's distortion of the right to procreate are staggering: In effect he claims that the right to procreate entitles a man to invoke the power of the government to compel a woman to bear his child. If he is correct, courts could order unwilling individuals to engage in uncontracepted sex with spouses or lovers desirous of having children. Or, an individual whose sexual partner did not wish to have a child could be compelled to use contraception during sex. The Supreme Judicial Court of Massachusetts outlined the insidious implications of judicial intervention in refusing to issue an injunction similar to the one requested by Mr. Conn:

> [W]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent contraception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . . Some things must be left to private agreement.

Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974).

Given the constitutional right not to procreate, a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion:

Mr. Conn's equal protection claim is equally without merit. "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances." *Frost v. Corporation Comm'n*, 278 U.S. 515, 522 (1928). Mr. Conn is *not* arguing that the same rule of law is being inequitably applied to him. Instead, he argues that he is being denied equal protection because he could be required by state statute to "provide the basic support needed for the survival" of a child of his marriage. Requiring parents to support their children financially is in no way comparable to forcing a woman to bear an unwanted child. Pet. at 29. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Norvell v. Illinois*, 373 U.S. 420, 423-24 (1963).

> If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy . . . ? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) (emphasis in original) (court refused to enjoin woman from having abortion opposed by man claiming responsibility for pregnancy, despite man's expressed desire to marry woman and assume responsibility for child), *cert. denied*, 415 U.S. 958 (1974).[10]

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10 Courts exercising equitable jurisdiction have historically been reluctant to compel the performance of personal services, particularly in the intimately private realm of family life and childbearing. Numerous cases have concluded that courts sitting in equity simply cannot compel performance of the most personal and intimate services without violating fundamental principles of privacy that restrain court intrusiveness. *E.g.*, *Janney v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889) (husband cannot obtain injunction against wife's mastectomy); *In re Clark*, 1 Blackf. 136, 136-38 (Ind. 1821) (enforcement of personal service contract "would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery").

A New Jersey court has aptly described the fundamental impropriety of granting the equitable relief sought by Mr. Conn:

> Plaintiff . . . [sought] an injunction against the planned abortion. The only possible way that the court could enforce such an injunction would be to confine. The alternative is merely to threaten a civil penalty for contempt if the abortion proceeds nonetheless. Assuming there were such a violation of this court's order by a young lady who is in school, who is four to six weeks pregnant, with or without medical testimony of her psychiatric condition, what are the alternatives open to the court? Fine her? Impose a jail sentence? The court will neither devise a penalty nor place a monetary value on either a woman's right to terminate pregnancy or on the potentiality of the four to six-week-old fetus. The court sees no

(*footnote continued*)

If Mr. Conn's analysis were accepted the federal courts would be called upon to resolve countless disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers unable to agree about whether to have a child.

b. Rights Derived From Marriage

Mr. Conn asserts that "the fact of his marriage" to Ms. Conn confers upon him "additional constitutional protection." Pet. at 20. Mr. Conn does not discuss in detail the nature of these additional constitutional rights, but he does refer to a "marital privacy right." Mr. Conn seems to be arguing that the privacy right inheres in the marital couple, rather than in the husband and wife as individuals. This view was rejected in *Danforth* and also runs counter to the basic principle that the privacy right protects individuals only from *government* action. Moreover, in *Eisenstadt v. Baird*, this Court expressly rejected the notion that the marital couple is a separate independent entity, and instead recognized marriage as "an association of two individuals each with separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972) (unmarried individuals have constitutional right to use contraceptives). The Court stated that "it is the right of the *individual*, married or single" to decide, "free from unwarranted government intrusion," whether or not to have a child. *Id.* (emphasis in original); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

Mr. Conn's assertion of rights "inherent in his status as a husband," pet. at 20-21, amounts to a claim that a man has the

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possible way, from a practical viewpoint, of enforcing such an injunction even if the law arguably justified the injunctive relief sought.

Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. 1977).

right to use the power of the state to subjugate his wife's will to his own. This outdated view of the marital relationship is inconsistent with this Court's condemnation of our country's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Since 1973, the Supreme Court has recognized that unimpeded access to safe legal abortion services is essential to women's capacity to live as free, equal and autonomous citizens. *See Roe*, 410 U.S. 113. Most recently, the Court reiterated this principle in *Thornburgh*:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond reach of government . . . . *That promise extends to women as well as to men*. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty *that our law guarantees equally to all.*

476 U.S. at 772 (citations omitted; emphasis added). Stripping women of control of their reproductive capacity, and giving that control to their husbands, would condemn women to a continued existence as unequal and subordinate members of our society.

c. Right to Raise One's Children

Mr. Conn's reliance on the constitutional right of fathers to "the care, custody, companionship, and control of their children," pet. at 17, is entirely irrelevant to Ms. Conn's decision to have an abortion. Certainly, fathers as well as mothers have constitutional rights (again, assertable only against government action) vis-a-vis their children. Yet those rights are not in any way implicated here because this case involves neither a child nor a father. Rather, the issue here is whether a man can force a

woman to bear a child and become a mother against her wishes in order to satisfy his desire to have a child.

The theoretical basis for Mr. Conn's asserted interests directly conflicts with settled case law. Mr. Conn's alleged "paternal rights" are ultimately based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet the Court in *Roe* rejected precisely this effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; *see also Akron*, 462 U.S. at 444 ("a State may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Indiana has not adopted as law Mr. Conn's theory of when life begins, but even if it had, such a law would plainly be unconstitutional and thus unable to support Mr. Conn's claims.

II. THE INDIANA SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE

Every appellate court to consider the issue has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *Lewis v. Lewis*, No. 111440 (Mich. Ct. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Ind. Sept. 22, 1988), *application for stay denied mem.*, Nos. A-240, A-244 (U.S. Sept. 26, 1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 566, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *Doe v. Smith*, 527 N.E. 2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jones v. Smith*, 278 So.2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *See also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Wis. Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress). Courts consistently

denied such requests even prior to *Danforth*: "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact." *Coleman*, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339. These cases were correctly decided and there is no reason to disturb this clear and unbroken precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 88-347

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v.

JENNIFER ANN CONN, *Respondent*.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Erin Andrew Conn (hereinafter the Father) replies to arguments first raised in Respondent's Brief in Opposition, pursuant to Sup. Ct. R. 22.5.

Respondent Jennifer Ann Conn (hereinafter the Mother) concedes the jurisdiction of this Court to hear thise case, Brief in Opposition at 4, but argues that this Court "should decline to exercise jurisdiction" because "the Indiana Supreme Court properly applied dispositive U.S. Supreme Court precedent." *Id.* Mr. Conn need not address the erroneous interpretation of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), employed by the lower court, as this matter has been addressed in his Petition for a Writ of Certiorari. Those cases do not preclude the consideration of Mr. Conn's rights and interests and the issuance of the injunction by the trial court herein.

However, Mr. Conn must reply to the second reason argued by Respondent for declining the exercise of this Court's jurisdiction. The Respondent asserts that "this Court need not even consider Ms. Conn's constitutional rights unless [*Roe v. Wade*] creates for a man an affirmative constitutional right to use the power of the government to interfere with a woman's private and constitutionally protected right to choose to have an abortion." *Id.*[1]

This argument is erroneous. The Father argues three theories in his Petition: (1) that under substantive due process analysis, the state has a compelling interest in protecting the Father's interests in his unborn child; (2) that under the traditional balancing approved by this Court where competing rights collide (e.g., freedom of the press versus the right to a fair trial), the balance, in this case, weighs in his favor; and (3) that under the equal protection and due process clauses of the Fourteenth Amendment and the reserved rights of the Ninth Amendment, the Father has an affirmative right to a judicial consideration of his rights and interests in his child in the context of a dissolution action when his wife proposes to abort the child. Petition for a Writ of Certiorari at 23, 27, 26.

The Wife, however, completely ignores the Father's first theory — substantive due process analysis — in her Brief and procedes on the basis that the abortion right is absolute and that fathers have no protectable interests in their unborn children. Employing substantive due process analysis, a state court may properly conclude that, on the facts of a particular case, the father's interests in his unborn child so far outweigh

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[1] This curious statement by the Wife is based upon her notion that, before birth, there is no father, mother, and child. Brief of Appellant in the Indiana Court of Appeals at 34 ("this case does not involve a child or a father"). Since no child exists herein, in the Wife's view, this case is a dispute between a man and a pregnant woman over abortion. In the Father's view, however, an unborn child exists, *Roe*, 410 U.S. at 165 n. 67 ("father"), 163 ("mother"), 162 ("unborn children"), and, thus, this case is a dispute between a mother and father over their child.

those of his wife in aborting their child that the state has a compelling interest in protecting his interests by enjoining her abortion. The Wife refused to employ the analysis mandated by *Roe*. She fails to demonstrate that substantive due process analysis is inappropriate or that the state, herein, has no compelling interest.

In contrast, the Wife seeks to recast this case as one focusing exclusively on the assertion of fathers' rights, requiring some state action against which the Father may assert his right. She wholly ignores substantive due process analysis and answers the other two theories with an assertion that *Roe* is absolute, fathers have no assertable rights in their unborn children, and an asserted lack of state action. However, this Court need never reach the latter two theories, for, by employing substantive due process analysis, it may find that the state court was not precluded by *Roe* and *Danforth* from considering the interests of Father in his unborn child and from enjoining the abortion of his child, if his interests are compelling. No state action against the Father need be shown in such an analysis.[2]

Indeed, it is urgent that this Court take this case because trial courts have been finding that, in individual cases, some fathers' interests have been compelling and need legal protection; the Mother cites cases where this is true, as in the present case. Brief in Opposition at 16. As she indicates, these findings have been overturned on appeal, based on erroneous interpretations of this Court's decisions in *Roe v. Wade* and *Planned*

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[2] The Wife attempts to invoke the comment of Justice Stevens in his opinion accompanying his denial of an injunction, barring an abortion, in *Doe v. Smith*, 108 S.Ct. 2136 (1988). Justice Stevens expressed "serious doubts" that there could be a federal remedy, because there was *no state action*. In that case, however, the trial court refused to issue an injunction and the Father was asserting, in part, that this constituted a violation of his constitutional rights. In the present case, however, the state court has acted to enjoin the Wife from aborting their unborn child. The Father herein, therefore, is defending this exercise of state power on the basis, in part, that the state court was acting to protect the Father's constitutional rights. Thus, Justice Stevens' remark is inapplicable.

Parenthood of Central Missouri v. Danforth. This demonstrates the gravity of the situation.

Every abortion involves a father, some of whom are also husbands, and the "vast majority" of these men are informed of the proposed abortion of their child. Brief in Opposition at 8-9 n. 6. Many of these men wish to assert their interests and rights and many states seem willing to protect these interests, in certain cases, when they are compelling. However, the Indiana Supreme Court in this case (as well as other state courts[3]) has interpreted the rulings of this Court to preclude such action on the erroneous basis that the abortion right is absolute and that there is no interest on the part of a father at all. It is urgent that this matter be resolved by this Court.

In sum, fathers with compelling interests are being deprived of a constitutionally permissible legal remedy by erroneous interpretations of this Court's holdings in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*. As a result, fathers are suffering grievous harm. It is crucial that this Court take this case to resolve the error of the lower courts which have "decided federal questions in a way in conflict with applicable decisions of this Court" and have erroneously "decided an important question of law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c).

Respectfully submitted,

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[3] *See, e.g., Lewis v. Lewis*, now before this Court on a Petition for a Writ of Certiorari to the Michigan Supreme Court, Docket Number 88-683.